Supreme Court, U.S.
FILED

08-111 JUL 10 2008

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No. 07-

IN THE
SUPREME COURT OF THE UNITED STATES

RONALD MICHAELS AND
DOLORES MICHAELS,

Petitioners,

v.

TOWNSHIP OF MACOMB,

Respondent.

On Petition for a Writ of Certiorari to the State of Michigan Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether petitioners were denied their rights to due process under the Fifth Amendment and the Fourteenth Amendment Due Process Clause by a state court order holding them in contempt for not complying with a consent judgment and imposing fines and incarceration, where the state court ruled without affording petitioners a due process hearing and without any evidence in the record before the state court, and where respondent's motion for an order finding petitioners in contempt did not comply with the state court rules.

PARTIES TO THE PROCEEDING

Petitioners Ronald Michaels and Dolores Michaels were defendants-appellants below.

Respondent the Township of Macomb, Michigan was the plaintiff-appellee below.

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DECISIONS BELOW

The decision of the Michigan Supreme Court, App. 1a, is unreported. The decision of the Michigan Court of Appeals, App. 3a, is unreported. The underlying decision of the Macomb County, Michigan Circuit Court, App. 5a-12a, is unreported.

JURISDICTION

The order of the Michigan Supreme Court denying discretionary review of the March 28, 2008 order of the Michigan Court of Appeals was entered on April 11, 2008. This Court has jurisdiction to review this decision under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides: "No person shall ... be deprived of life, liberty, or property, without due process of law...."

The Fourteenth Amendment to the United States Constitution provides: "nor shall any state deprive any person of life, liberty, or property, without due process of law ...."

STATEMENT OF THE CASE

This petition seeks review of the decision of the Michigan Supreme Court denying petitioners' application for leave to appeal the March 28, 2008 order of the Michigan Court of Appeals, which denied petitioners' application for leave to appeal from the February 27, 2008 order of the Macomb County, Michigan Circuit Court finding petitioners in contempt of court for not complying with a June 30, 2004 consent judgment and imposing fines and possible incarceration. Absent review by this Court, state courts will

be permitted to find parties in contempt of court for actions that occurred outside the presence of the court and impose monetary fines and incarceration without holding any evidentiary hearing or without requiring that the record contain some evidence presented under oath of the actions which are alleged to be the basis for the order of contempt.

This Court's intervention is required because the state court rulings on which petitioners seek review violate petitioners' due process rights under the Fifth and Fourteenth Amendments, and are directly contrary to this Court's decisions upholding the guarantees of due process in the Fifth and Fourteenth Amendments before a party can be deprived of property through monetary fines and liberty through incarceration. This becomes even more evident in view of this Court's decisions that a contempt proceeding in which the court imposes fines for past conduct, which the contemnor could not reduce by future compliance with the court's order, should be viewed as criminal rather than civil in nature.

Review is also warranted because the decision below is mistaken in three fundamental respects. First, the Michigan appellate courts erred in not holding that the Macomb County Circuit Court lacked jurisdiction over petitioners as to the contempt issue because respondent had not complied with the procedures set forth in state court rules as to contempt proceedings. Second, the state appellate courts erred in not finding that the Macomb County Circuit Court abused its discretion and violated petitioners' due process rights when it find petitioners in contempt of court without an evidentiary hearing. Third, the Macomb County Circuit Court abused its discretion and violated petitioners' due process rights when it ordered that petitioners could serve jail time without holding an evidentiary hearing and without making a determination as to whether petitioners could comply with the contempt order or what was the

character and magnitude of the harm threatened by continued contumacy.

1. Respondent the Township of Macomb, Michigan initiated the underlying lawsuit against petitioners Ronald Michaels and Dolores Michaels on September 20, 1995. On June 30, 2004 the parties agreed to a consent judgment, App. 13a-15a, which was entered by the Macomb County, Michigan Circuit Court on June 30, 2004. One of the terms of the consent judgment was that petitioners would remove all "composting materials" from their composting operation no later than December 31, 2007. App. 14a.

Relevant portions of the consent judgment are:

> 1. The defendants, RONALD and DOLORES MICHAELS, shall permanently cease receiving from off-site sources, leaves, grass, yard clippings, and other compostible [*sic*] materials at their farm in Macomb Township and the composting site will be closed as of December 31st, 2005.
>
> 2. All composting materials shall be removed from the composting operation no later than December 31st, 2007.
>
> * * * * * *
>
> 5. Any finished compost may be removed in bulk from the site and sold commencing with the effective date of this Consent Judgment.

App. 13a-15a.

2. On November 28, 2007, petitioners filed with the Macomb County Circuit Court a satisfaction of the

consent judgment, affirmatively stating that all composting materials had been removed from the site. On December 12, 2007, respondent filed objections to the satisfaction of the consent judgment, but did not file a motion to set aside the satisfaction of judgment or take any other action. Respondent also did not have anyone come to petitioners' composting site to confirm whether petitioners had removed all composting material from the site as they had stated in the satisfaction of consent judgment.

2. On January 7, 2008, respondent filed a motion for an order finding petitioners in contempt because they did not remove all composting materials from the site on which petitioners had located their compost operation by December 31, 2007. This motion was not supported by any affidavit or other evidence as to what composting materials allegedly remained on the site after December 31, 2007, but merely contained assertions made by counsel for respondent, who had not even been to the site between November 28, 2007 and the date of the filing of the motion on January 7, 2008 or the date of oral argument on the motion, which was held on January 14, 2008. Respondent did not file a motion to show cause or support its motion for contempt with any affidavit. Respondent's contempt motion did not specify whether it was seeking criminal or civil contempt sanctions. Respondent did not personally serve petitioners with the contempt motion, but instead just sent a copy of the motion by mail to petitioners' prior counsel.[1]

It is undisputed that the Macomb County Circuit Court never held an evidentiary hearing on respondent's motion or to determine whether petitioners, as the alleged contemnors, actually committed contempt.

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[1] Respondent did not even comply with M.C.R. 2.119(C)(1)(a), which requires 9 days' notice of a hearing if a motion is served by mail on opposing counsel.

The Macomb County Circuit Court issued its opinion and order finding petitioners in contempt of court on February 27, 2008. App. 5a-12a. In its opinion and order, the Macomb County Circuit Court held that the language of the consent judgment - as a contract - was unambiguous, and then made determinations as to petitioners' intent in entering into that consent judgment, without any basis of fact in the record before the court. The Macomb County Circuit Court ordered petitioners to pay a fine of $250 for each day after December 31, 2007 through February 27, 2008 (the date of the order) and every day thereafter that petitioners allegedly were not in compliance with the consent judgment, and ordered petitioners held in jail after thirty (30) days from the date of the order if they still had not complied with the court's order, as well as pay respondent's fees and costs for bringing the contempt motion. App. 5a-12a.

On March 17, 2008, the Macomb County Circuit Court declined to reconsider its opinion and order and denied petitioners' motion for stay of proceedings pending appeal.

3. Petitioners filed an emergency application for leave to appeal, which petitioners were required to do because the state appellate courts considered the order finding petitioners in contempt to be a post-judgment order from which there was no appeal as of right. Respondent contended in its opposition pleadings that no evidentiary hearing was required before a trial court could hold a defendant in contempt for alleged actions which were committed outside the immediate presence of the court. The Michigan Court of Appeals on March 28, 2008 granted the application in part to modify the fine from $250 a day, with no limitation, to $7,500, the statutory maximum fine provided in M.C.L. 600.1715(1), but denied the remainder of the application on the merits. App. 3a.

4. Petitioners then filed with the Michigan Supreme Court an emergency application for leave to appeal

from the Michigan Court of Appeals' March 28, 2008 order. The Michigan Supreme Court denied the application for leave to appeal on April 11, 2008. App. 1a.

REASONS FOR GRANTING THE PETITION

This Court has long upheld the guarantees in the Fifth and Fourteenth Amendments to the United States Constitution that a person shall not be deprived of liberty or property without due process of law. These guarantees extend as well to proceedings alleging contempt outside the immediate presence of the court, particularly where the penalties for a finding of contempt include more than just *de minimis* prospective fines and incarceration.

However, in the rulings on which petitioners seek review before this Court, petitioners were deprived of their property through monetary fines and face deprivation of their liberty through incarceration without any court holding an evidentiary hearing, or having before it any evidence whatsoever, to support respondent's allegation that petitioners were in contempt of the June 30, 2004 consent judgment. Despite petitioners bringing the fact that they were deprived of liberty and property without due process of law before the Michigan Court of Appeals and the Michigan Supreme Court, these courts did not set aside the ruling of the Macomb County Circuit Court, or even remand the case back to the Macomb County Circuit Court to have that court hold an evidentiary hearing. Indeed, the Michigan Court of Appeals found that petitioners' application for leave to appeal lacked merit on respondent's argument that no evidentiary hearing or the taking of evidence is required before holding a party in contempt for actions allegedly committed outside the immediate presence of the court. Petitioners have been deprived of their constitutional rights and have no other recourse. This Court should grant review of this petition because the ruling of the state court in this matter clearly decides an important question of federal

constitutional law in a way that directly conflicts with decisions of this Court.

I. THE DECISION BELOW DIRECTLY CONFLICTS WITH THE RULINGS OF THIS COURT

Michigan's failure to hold an evidentiary hearing, or require that the record contain any relevant and admissible evidence, before finding petitioners in contempt for allegedly not complying with a term in the June 30, 2004 consent judgment is incompatible with this Court's decisions upholding the guarantees found in the Fifth and Fourteenth Amendment of due process before a court can order deprivation of liberty and property in contempt proceedings.

While the order of the Macomb County Circuit Court purports to assess against petitioners a civil, as opposed to a criminal, sanction for petitioners' alleged failure to comply with this consent judgment, this Court's decision in *Int'l Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821 (1994), makes it clear that the Macomb County Circuit Court's order instead imposed a criminal sanction. While both civil and criminal sanctions for contempt can be imposed only after constitutional safeguards have been observed, there are heightened constitutional protections for criminal proceedings.

This Court in *Bagwell* stated initially that "[w]e are called upon once again to consider the distinction between civil and criminal contempt. Specifically, we address whether contempt fines levied against a union for violations of a labor injunction are coercive civil fines, or are criminal fines that constitutionally could be imposed only through a jury trial." *Id.* at 823. This Court recognized that it previously held that

> "Criminal contempt is a crime in the ordinary sense," *Bloom v. Illinois*, 391 U.S. 194, 201 (1968), and "criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings." *Hicks v. Feiock*, 485 U.S. 624, 632 (1988). ... In contrast, civil contempt sanctions, or those penalties designed to compel future compliance with a court order, are considered to be coercive and avoidable through obedience, and thus may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard. Neither a jury trial nor proof beyond a reasonable doubt is required.

512 U.S. at 826-27. This Court turned to that which distinguished between civil and criminal contempt, and cited its earlier decision in *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911), in which this Court

> emphasized that whether a contempt is civil or criminal turns on the "character and purpose" of the sanction involved. Thus, a contempt sanction is considered civil if it "is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court."

512 U.S. at 827-28 (quoting *Gompers, supra*).

This Court recognized that "[m]ost contempt sanctions, like most criminal punishments, to some extent punish a prior offense as well as coerce an offender's future obedience." *Id.* at 828. As it found in its prior holding in *Hicks v. Feiock*, 485 U.S. 624 (1988),

> conclusions about the civil or criminal nature of a contempt sanction are properly drawn, not from "the subjective intent of a State's laws and its courts," but "from an examination of the character of the relief itself."

Id. (quoting *Hicks*, 485 U.S. at 636). In applying this analysis to contempt fines, this Court found that

> A contempt fine accordingly is considered civil and remedial if it either "coerces the defendant into compliance with the court's order, [or] ... compensates the complainant for losses sustained." *United States v. Mine Workers*, 330 U.S. 258, 303-304 (1947). Where a fine is not compensatory, it is civil only if the contemnor is afforded an opportunity to purge. *See Penfield Co. of Cal. v. SEC*, 330 U.S. 585, 590 (1947). Thus, a "flat, unconditional fine" totaling even as little as $50 announced after a finding of contempt is criminal if the contemnor has no subsequent opportunity to reduce or avoid the fine through compliance. *Id.* at 588.

Id. at 829. This Court also recognized that if the trial court in the case before it had simply levied fines after finding the union guilty of contempt, the resulting "determinate and unconditional" fines would be considered "solely and exclusively punitive." *Id.* at 836 (quoting *Hicks*, 485 U.S. at 632-33).

This Court then addressed the procedural protections afforded when a contempt occurs outside the immediate presence of a court. It stated clearly that "[s]ummary adjudication of indirect contempts is prohibited." *Id.* at 833 (citing *Cooke v. United States*, 267 U.S. 517, 534 (1925).

This Court affirmed in *Pounders v. Watson*, 521 U.S. 982 (1997) that a party facing a charge of contempt is entitled to due process through a hearing, the presence of counsel and an opportunity to call and examine witnesses. This Court in prior rulings limited summary contempt orders, in which the party is not afforded a due process evidentiary hearing, only to cases in which the party committed misconduct in the presence of the court and which disturbed the court's business:

> We have held the summary contempt exception to the normal due process requirements, such as a hearing, counsel, and the opportunity to call witnesses, "includes only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent 'demoralization of the court's authority' before the public." *In re Oliver*, 333 U.S. 257, 275 (1948) (quoting *Cooke* [*v. United States*, 267 U.S. 517,] 536 [(1925)].
>
> We have stressed the importance of confining summary contempt orders to misconduct occurring in court. Where misconduct occurs in open court, the affront to the court's dignity is more widely observed, justifying summary vindication. *See In re Green*, 369 U.S. 689, 692 (1962) (relying on due process cases); *Harris v. United States*, 382 U.S. 162, 164 (1965) (defining boundary between summary and ordinary contempt under Fed. Rule Crim. Proc. 42).

521 U.S. at 988.

This Court's rulings clearly provide that petitioners were entitled to due process through a hearing and an opportunity to call witnesses before the state court found them in contempt of court. Further, the Macomb County Circuit Court assessment on February 27, 2008 of a fine from January 1, 2008 until the date of the order, February 27, 2008 was punitive in nature, since the fine was paid to the court, not respondent as complainant, and was a fine which petitioners could not reduce or avoid through future compliance. Given the punitive nature of this fine, the contempt proceedings were accordingly criminal in nature, and petitioners should have been afforded the heightened constitutional protections which are afforded in criminal proceedings, beyond simply an evidentiary hearing and the opportunity to call witnesses. The decision of the court below is a marked departure from this Court's rulings and departs completely from this Court's decisions on the important question of due process rights guaranteed under the federal constitution. Only this Court can resolve this conflict between this Court's rulings and Michigan's decisions in this case as to whether a party is entitled to due process protection through an evidentiary hearing or the requirement that there be present in the record admissible and relevant evidence, at a very minimum, before a state court can find that party in contempt of court for an alleged action that occurred outside the immediate presence of the court.

II. THIS COURT SHOULD GRANT REVIEW IN ORDER TO HALT MICHIGAN'S UNCONSTITUTIONAL FINDING OF CONTEMPT WITHOUT AFFORDING THE ALLEGED CONTEMNOR DUE PROCESS AND BECAUSE THE DECISION BELOW IS WRONG

Petitioners submit that review is also warranted because the ruling below is wrong on the merits. First, the Michigan appellate courts erred in not holding that the Macomb County Circuit Court lacked jurisdiction over petitioners as to the contempt issue because respondent had not complied with the procedures set forth in state court rules as to contempt proceedings. Second, the state appellate courts erred in not finding that the Macomb County Circuit Court abused its discretion and violated petitioners' due process rights when it find petitioners in contempt of court without an evidentiary hearing. Third, the Macomb County Circuit Court abused its discretion and violated petitioners' due process rights when it ordered that petitioners could serve jail time without holding an evidentiary hearing and without making a determination as to whether petitioners could comply with the contempt order or what was the character and magnitude of the harm threatened by continued contumacy.

A. The Macomb County Circuit Court Lacked Jurisdiction Over Petitioners Because Respondent Failed To Comply With The State Court Rules As To Contempt Proceedings

The state courts below erred in denying petitioners' applications for leave to appeal and the relief petitioners requested therein, since the Macomb County Circuit Court lacked jurisdiction over petitioners by respondent's failure to comply with the procedures set forth in state court rules governing contempt proceedings. The register of actions and record make clear that respondent failed to comply with M.C.R. 3.606, the state court rule as to contempt proceedings, because it did not institute the contempt proceedings with a motion to show cause or support its motion for contempt with any affidavit. Additionally, respondent did not fulfill its obligation to advise petitioners as to whether the contempt being alleged was criminal or civil in nature. Further, respondent did not serve its motion by personal service on petitioners, the alleged contemnors, as required when the alleged contempt consists of disobeying an order of the court. Accordingly, because of the numerous procedural defects, the courts below could not have found that the circuit court had jurisdiction over petitioners, and thus the circuit court could not have entered its opinion and order finding petitioners in contempt of the consent judgment.

It is not disputed that the contempt which respondent alleges that petitioners committed -- not complying with a consent judgment -- occurred outside the immediate presence of the circuit court. M.C.R. 3.606 provides, in pertinent part:

> Contempts Outside Immediate Presence of Court

> (A) Initiation of Proceedings. For a contempt committed outside the immediate view and presence of the court, on a proper showing on ex parte motion supported by affidavits, the court shall either
>
> (1) order the accused person to show cause, at a reasonable time specified in the order, why that person should not be punished for the alleged misconduct; ....

The court rule thus mandates that a party seeking to have a court hold another party in contempt must either file a motion for an order to show cause or a motion for contempt which is supported by affidavits. As the court stated in *In re Contempt of Robertson*, 209 Mich. App. 433, 531 N.W.2d 763 (1995),

> Contempt proceedings for contempts committed outside the immediate view and presence of the [judge] must be initiated through an ex parte motion supported by an affidavit of facts showing the alleged contemptuous conduct. MCR 3.606(A).

Id., 209 Mich. App. at 438-39. *Accord In re Contempt of McRipley*, 204 Mich. App. 298, 301, 514 N.W.2d 219 (1994); *In re Contempt of Nathan*, 99 Mich. App. 492, 495, 297 N.W.2d 646 (1980).

Respondent's motion for an order finding petitioners in contempt failed to comply with M.C.R. 3.606. Respondent's motion was not a motion for an order directing petitioners to show cause why they should not be held in contempt. Instead, it is a motion alleging contempt

purportedly occurring outside the immediate presence of the trial court, which is supported only by hearsay statements of counsel in the motion itself. The record is clear, and respondent cannot dispute, that respondent never attached to its contempt motion any affidavit, as required by M.C.R. 3.606(A).

The court in *S. Abraham & Sons, Inc. v. Dept. of Treas.*, 260 Mich. App. 1, 677 N.W.2d 31 (2003), addressed this very issue, and determined:

> defendant's alleged disobedience of the Court of Claims order occurred outside the court's presence, requiring compliance with the procedures detailed in MCR 3.606. *Auto Club Ins Ass'n, supra* at 712-713, 718; see also MCL 600.1711. Contrary to MCR 3.606, plaintiffs did not institute the contempt proceedings with a motion to show cause or support their motions for contempt with affidavits (other than an affidavit supporting the amount of attorneys fees requested). As such, the trial court lacked jurisdiction over defendant.

Id., 260 Mich. App. at 24 n.11.

Likewise in the case at bar, respondent did not institute the contempt proceedings with a motion to show cause or support its motion for contempt with an affidavit. Accordingly, the Macomb County Circuit Court lacked jurisdiction over petitioners and therefore wrongfully issued its opinion and order holding petitioners in contempt. The state appellate courts erred in not setting aside this contempt order for lack of jurisdiction and failure to comply with the mandatory procedures set forth in the state court rules.

Additionally, respondent committed other procedural defects in its motion for contempt, which also operated to make the Macomb County Circuit Court lack jurisdiction over petitioners. First, respondent's motion for contempt did not state whether the alleged contempt was criminal or civil in nature. Second, respondent failed to serve its contempt motion on petitioners personally.

The court in *S. Abraham & Sons, Inc.* addressed these issues as well, and found that the failure of the plaintiffs in that case to fulfill their obligation to advise the defendant whether the contempt being alleged was civil or criminal in nature and to serve the contempt motion on defendant personally were procedural defects which tainted the contempt hearing, mandating that the order of contempt be reversed. 260 Mich. App. at 24 n.11. *Accord In re Contempt of Auto Club Ins. Ass'n.*, 243 Mich. App. 697, 716, 624 N.W.2d 443 (2000); *In re Contempt of Robertson,* 209 Mich. App. 433, 438, 531 N.W.2d 763 (1995). The court stated specifically in *In re Contempt of Steingold*, 244 Mich. App. 153, 624 N.W.2d 504 (2000):

> Additionally, when contempt proceedings for violating a court order are initiated, the notice or order must be personally served on the alleged contemnor. MCL 600.1968(4); MSA 27A.1968(4); MCR 2.107(B)(1)(b).

Id., 244 Mich. App. at 158.

It is also undisputed that respondent never stated in its contempt motion at any place whether the contempt which respondent alleged was criminal or civil in nature. It is further undisputed, and review of the record reflects, that respondent did not serve petitioners personally with the motion for contempt, but only sent a copy of it by mail to the attorney who was petitioners' counsel at the time of the June, 2004 consent judgment. Thus, because of these procedural

defects respondent's motion for contempt was not properly before the Macomb County Circuit Court. The state appellate courts therefore erred in not setting aside the contempt order.

Accordingly, because respondent did not initiate contempt proceedings by filing a motion for an order compelling petitioners to show cause as to why they should not be held in contempt, or by filing an affidavit with its contempt motion, as MCR 3.606 requires, and because respondent did not state anywhere in its motion whether the contempt it alleged that petitioners committed was civil or criminal in nature, and because respondent did not personally serve petitioners with the contempt motion, the state appellate courts erred in not holding that the lacked jurisdiction over petitioners and could not have issued an order holding petitioners in contempt of court. Petitioners therefore respectfully request that this Court grant review in this case.

B. The Macomb County Circuit Court Abused Its Discretion And Violated Petitioners' Due Process Rights When It Found Petitioners In Contempt Without Holding An Evidentiary Hearing

The lower courts also erred in denying petitioners' application for leave to appeal, since the Macomb County Circuit Court abused its discretion and violated petitioners' due process rights in finding petitioners in contempt of court without an evidentiary contempt hearing, which would have afforded petitioners the due process for which the Due Process Clause provides. Instead, without any sworn affidavits or other admissible evidence before the court or evidence taken at an evidentiary hearing, the Macomb County Circuit Court made certain "findings" and based on those "findings," found petitioners in contempt, imposed a fine of $250 a day from January 1, 2008 until February 27,

2008, and for each day thereafter that petitioners were allegedly not in compliance with the consent judgment, and jail confinement after 30 days of non-compliance with the circuit court's order.

Under Michigan law, contempt of court is a willful act, omission, or statement that tends to impair the authority or impede the functioning of a court. *In re Contempt of Robertson*, 209 Mich. App. 433, 436, 531 N.W.2d 763 (1995); *Pontiac v. Grimaldi*, 153 Mich. App. 212, 215, 395 N.W.2d 47 (1986). As the court stated in *In re Contempt of Auto Club Ins. Ass'n.*, 243 Mich. App. 697, 624 N.W.2d 443 (2000),

> The power to hold a party, attorney, or other person in contempt is the ultimate sanction the trial court has within its arsenal, allowing it to punish past transgressions, compel future adherence to the rules of engagement, *i.e.*, the court rules and court orders, or compensate the complainant. *In re Contempt of Robertson*, [*supra*].... Because the power to hold a party in contempt is so great, it "carries with it the equally great responsibility to apply it judiciously and only when the contempt is clearly and unequivocally shown."

Id., 243 Mich. App. at 708 (*citing People v. Matish*, 384 Mich. 568, 572, 184 N.W.2d 915 (1971)).

Similar to this Court's determination in *Bagwell*, the state court in *In re Contempt of Auto Club Ins. Ass'n.* made clear that

> The trial court must carry out the proper procedures before it can issue the order holding an individual or party in contempt of

> court in order to carry out its goal of *coercing* particular action or *punishing* a misdeed.

Id., 243 Mich. App. at 711 (emphasis in original).

According to the court in *In re Contempt of Auto Club Ins. Ass'n.*,

> If the contemptuous conduct occurs outside the court's direct view, *i.e.*, it is "indirect" contempt, the court must hold a hearing to determine whether the alleged contemnor actually committed contempt. This hearing must follow the procedures established in M.C.R. 3.606 and afford some measure of due process before the court can determine whether there is sufficient evidence of contempt to warrant sanctions.

Id., 243 Mich. App. at 712-13. *Accord In re Collins*, 329 Mich. 192, 196, 45 N.W.2d 31 (1950); *In re Contempt of Robertson*, 209 Mich. App. 433, 438, 440, 531 N.W.2d 763 (1995); *Fraternal Order of Police, Lodge #98 v. Kalamazoo Co.*, 82 Mich. App. 312, 315-16, 266 N.W.2d 805 (1978); *In re Henry*, 32 Mich. App. 654, 659, 189 N.W.2d 96 (1971). In *In re Contempt of Robertson*, the court stated:

> These minimal due process safeguards require that an accused be given a reasonable time in which to prepare a defense to the contempt charge.

Id., 209 Mich. App. at 438.

Michigan case authority decided prior to the case at bar held that a hearing on an allegation of contempt must be more than summary proceeding or hearing on a motion; the rules of evidence apply at the hearing regarding the contempt

charges. *In re Contempt of Robertson*, 209 Mich. App. at 439. The standard of proof is more stringent than in other civil actions; proof of contempt must be clear and unequivocal. *People v. Matish*, 384 Mich. 568, 572, 184 N.W.2d 915 (1971); *In re Contempt of Robertson*, 209 Mich. App. at 439; *Detroit Bd. of Ed. v. Detroit Federation of Teachers*, 55 Mich. App. 499, 505-06, 223 N.W.2d 23 (1974). Thus, the court found in *In re Contempt of Robertson* that, where the order of contempt was based on the representations of plaintiff's counsel made at a motion hearing -- as in the case at bar -- and not through an evidentiary hearing, there was not sufficient evidence to support an order of contempt because the finder of fact had not gained personal knowledge of the contempt. *In re Contempt of Robertson*, 209 Mich. App. at 440-41.

This state case authority concords with the decisions of this Court which petitioners have set forth in Section I, *supra*. Petitioners were entitled to due process which the federal constitutional guaranteed them before they could be found in contempt of court.

It cannot be disputed in the case at bar that the Macomb County Circuit Court did not hold an evidentiary hearing or require the submission of any sworn evidence before holding petitioners in contempt. There was no sworn evidence in the record before the circuit court, as respondent had not even attached an affidavit to its contempt motion.

The circuit court did not convene a hearing but simply heard oral arguments of counsel, which could only be, at best, hearsay statements, and then made "findings" based on respondent's counsel's representations (even though neither he nor anyone from the Township had actually gone to petitioners' site to see whether composting materials in fact remained on the site).

The circuit court first reviewed the consent judgment as a whole, and determined that the terms of the consent judgment, as a contract, were unambiguous. App. 8a. It has long been established in Michigan that when construing contracts, courts are not called upon to re-make the contracts for the parties, but rather to ascertain the contracts' provisions and to enforce them. *Thayer v. Augustine*, 55 Mich. 187, 20 N.W. 898 (1884). Courts must take written instruments as they come to them and whether carefully prepared or thrown together haphazardly, determine their legal effect and if valid, enforce them. *Stout v. Hallsted*, 239 Mich. 81, 214 N.W. 160 (1927). In *Cottrill v. Mich. Hosp. Svc.*, 359 Mich. 472, 102 N.W.2d 179 (1960), the court clearly stated:

> It is elementary that contracts ... which are unambiguous are not open to construction and must be enforced as written. *Harrington v. Inter-State Business Men's Accident Ass'n.*, 210 Mich. 327, 178 N.W. 19 (1920).

Id., 359 Mich. at 475. It is *only* upon a determination by a court that a particular contract is indeed ambiguous that the court then must consider the rules of contract construction. As the court stated in *William C. Roney & Co. v. The Fed. Ins. Co.*, 674 F.2d 587 (6th Cir. 1982), relying on the Michigan Supreme Court's decision in *New Amsterdam Casualty Co. v. Sokolowski*, 374 Mich. 340, 132 N.W.2d 66 (1965):

> As a prerequisite to applying rules of construction, a contract must be ambiguous, in that the parties' expressions are subject to more than one logical interpretation; otherwise, it is to be construed according to the plain meaning of the terms. *New Amsterdam Casualty Co. v. Sokolowski*, 374 Mich. 340, 132 N.W.2d 66 (1965).

647 F.2d at 589.

In the case at bar, the circuit court determined that the consent judgment was unambiguous. Accordingly, the trial court did not have the right to make a different contract for the parties or to look to extrinsic testimony to determine their intent when the words used by them are clear and unambiguous and have a definite meaning. *Zurich Ins. Co. v. CCR & Co.*, 226 Mich. App. 599, 604, 576 N.W.2d 392 (1997) (quoting *Mich. Chandelier Co. v. Morse*, 297 Mich. 41, 49, 297 N.W. 64 (1941) (citation omitted). Reviewing courts must interpret the terms of the contract in accordance with their commonly used meanings. *Henderson v. State Farm Fire & Cas. Co.*, 460 Mich. 348, 354, 596 N.W.2d 190 (1999).

The circuit court correctly stated the case authority, but then inexplicitly failed to follow that authority as to interpretation of the "contract" set forth in the consent judgment. The circuit court, after finding the contract unambiguous, still attempted to set forth the perceived intent of petitioners at the time of formation of the consent judgment. App. 8a. However, the trier of fact is to determine the intent of the parties only if the meaning of an agreement is ambiguous or unclear. *Chrysler Corp v. Brencal Contractors, Inc.*, 146 Mich. App. 766, 775, 381 N.W.2d 814 (1985).

Most importantly, the circuit court did not have before it in the record through submission by the parties or through an evidentiary hearing any evidence from which it could make its factual findings as to the parties' intent. Without such evidence, there was no basis for the circuit court to make its factual findings, which compounds the denial to petitioners of their due process rights. Thus, there was no "clear and unequivocal" proof of contempt before the circuit court from which it could determine that petitioners

should be held in contempt. Simply, petitioners were never afforded the due process to which they were entitled.

This becomes even more egregious when viewed in the light of this Court's decision in *Bagwell*. Since the fine which the Macomb County Circuit Court imposed was for a two month period which had already occurred, there was no way in which petitioners could purge themselves and avoid this fine by future compliance, and this fine was therefore punitive in nature under this Court's definition in *Bagwell* and preceding cases. Since the fine was punitive, the contempt proceedings were criminal, not civil, in nature, and petitioners were entitled to the due process protections afforded to defendants in criminal proceedings. Yet petitioners did not even receive the barest minimum of due process before the Macomb County Circuit Court found them in contempt and assessed fines and possibly incarceration. The decisions below therefore unconstitutionally violate petitioners' due process rights.

Accordingly, because the Macomb County Circuit Court did not afford petitioners due process by conducting an evidentiary hearing on respondent's motion for contempt (assuming that the circuit court had jurisdiction over that motion) and because the record contains no sworn testimony that comports with the rules of evidence from which the circuit court could have made findings of fact, the circuit court abused its discretion and violated petitioners rights to due process by issuing an order holding petitioners in contempt of court, the state appellate courts erred in not setting aside the contempt order. Petitioners therefore respectfully request that this Court grant review in this case.

C. The Macomb County Circuit Court Abused Its Discretion And Violated Petitioners' Due Process Rights When It Ordered That Petitioners Could Spend Time In Jail For The Alleged Contempt

The lower courts further erred in denying petitioners' application for leave to appeal, since the Macomb County Circuit Court abused its discretion and violated petitioners' rights to due process when it ordered that petitioners could spend time in jail without holding an evidentiary hearing and without making a determination as to whether petitioners could comply with the contempt order or what was the character and magnitude of the harm threatened by continued contumacy.

It is well established under Michigan case authority that any jail confinement for contempt is conditional upon the contemnor's continuing in his contempt. A party thus has the opportunity to secure his release by purging himself of his contempt. Furthermore, a state court is required to find that the defendant is or could be of "sufficient ability" to comply with the contempt order. *Sword v. Sword*, 59 Mich. App. 730, 734, 229 N.W.2d 907 (1975). Such ability to comply is also prerequisite to a sentence of coercive commitment. *Borden v. Borden*, 67 Mich. App. 45, 50, 239 N.W.2d 757 (1976). When the purpose of the court is to coerce compliance, "it must then consider the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired." *United States v. United Mine Workers*, 330 U.S. 258, 303-04 (1947); *In re Contempt of Dougherty*, 429 Mich. 81, 98, 413 N.W.2d 392 (1987).

If the Macomb County Circuit Court had held a contempt hearing, it would have had the opportunity to take testimony from witnesses and petitioners themselves to find out if petitioners could even comply with the contempt order

or whether there were any unforeseen or extenuating circumstances which prevented compliance, such as an order from another court or state regulations mandating certain behavior. The circuit court had no knowledge whether compliance with its order was even reasonably possible before it ordered that petitioners could possibly be incarcerated.

The circuit court also made no determination of the character and magnitude of the harm threatened by continued contumacy. The February 27, 2008 Opinion and Order is wholly devoid of any language which would indicate what harm has befallen respondent due to the fact that there may be some compost on petitioners' farm. App. 3a-9a. If the circuit court had held an evidentiary hearing, then it could have reasonably made a determination as to whether the alleged compost that remained had any dangerous propensities (which it does not), and could have learned that there were no complaints of odor or any other nuisance for more than three years. Because there is no evidence in the record regarding the character and magnitude of harm that the alleged compost on site causes or what was the character and magnitude of the harm threatened by continued contumacy or whether petitioners could comply with the contempt order, the circuit court abused its discretion and violated petitioners' due process rights in ordering that they could serve jail sentences until petitioners complied with the contempt order. The state appellate courts accordingly erred in not setting aside this contempt order. Petitioners therefore respectfully request that this Court grant review in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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JULY 2008

Order

April 11, 2008

Michigan Supreme Court
Lansing, Michigan
Clifford W. Taylor
Chief Justice

136134
& (12)
(13)(14)
(15)(16)

Michael F. Cavanaugh
Elizabeth A. Weaver
Marilyn Kelly
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman,
Justices

MACOMB TOWNSHIP,
Plaintiff-Appellee,

v

SC: 136134
COA: 384479
Macomb CC: 95-004372-CZ

RONALD MICHAELS and
DOLORES MICHAELS,
Defendants-Appellants.

_____/

On order of the Court, the motions for immediate consideration are GRANTED. The application for leave to appeal the March 28, 2008 order of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court. The motions for stay are DENIED as moot.

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

April 11, 2008 /s/ Corbin R. Davis
Clerk

Court of Appeals, State of Michigan

ORDER

Elizabeth L. Gleicher
Presiding Judge

Mark J. Cavanagh
Deborah A. Servitto
Judges

TOWNSHIP OF MACOMB V RONALD MICHAELS

Docket No. 284479

LC No. 95-004372-CZ

The Court orders that the motion for immediate consideration is GRANTED.

Pursuant to MCR 7.205(D)(2), the Court orders that the portion of the Macomb Circuit Court's February 27, 2008 opinion and order is VACATED to the extent the court ordered defendants to pay a fine which exceeded the statutory maximum of $7500 set by 600.1715(1). The circuit court imposed a fine of $250 per day for each day of noncompliance after December 31, 2007. The court may not exceed the statutory limit by assessing fines on a daily basis in this manner. *In re Contempt of ACIA*, 243 Mich App 697, 719; 624 NW2d 443 (2000); *In re Contempt of Johnson*, 165 Mich App 422, 429-430; 419 NW2d 419 (1988). Defendants' fine is therefore limited to a total of $7500.

In all other resects the delayed application for leave to appeal is DENIED for lack of merit in the grounds presented.

The motion for stay is DENIED as moot.

Servitto, J. did not participate.

[A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on March 28, 2008]

STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

TOWNSHIP OF MACOMB,
Plaintiff,

vs. Case No. 1995-4372-CZ

RONALD MICHAELS and
DELORES MICHAELS,
Defendant,

_____/

OPINION AND ORDER

Plaintiff moves for an order finding Ronald and Delores Michaels in contempt of the June 30, 2004, consent judgment.

Plaintiff filed the instant action on September 20, 1995. In the *Opinion and Order* dated February 18, 2004, the Court set forth the facts and history pertaining to the instant action; the Court will not reiterate the entire background. Plaintiff first brought a complaint against defendants in 1991, complaining that their 300-acre farm, zoned agricultural, is site of a large-scale composting operation. Residents of the surrounding area complained about the odor. The initial action ended in 1993. Plaintiff's instant action sought declaratory judgment (count I) and injunctive relief (count II) and alleges nuisance per se (count III). After ten years and much negotiation, the parties finally entered into a Consent Judgment on June 30, 2004. Plaintiff now moves to hold defendants in contempt for violating the consent judgment.

Plaintiff contends the consent judgment required defendants to remove all compost materials from the property in Macomb Township no later than December 31, 2007. Plaintiff avers that as of January 2, 2008, defendants have 250,000 cubic yards of compost on site. Plaintiff argues, first, that Delores Michaels has admitted under oath that all materials must be removed by December 31, 2007. Second, plaintiff contends that the phrases "compostible materials" and "composting materials" as set forth in the consent judgment include "finished compost." Third, plaintiff asserts that the transcript of the settlement agreement placed on the record on June 24, 2004, states that all materials associated with composting must be removed from the site by December 31, 2007.

In response, defendants aver that the consent judgment distinguishes between "compostible materials," "composting materials" and "finished compost." Defendants agree that the consent judgment provided that defendants would cease receiving all "compostible materials," including leaves, grass, yard clippings, etc by December 31, 2005. Defendants contend that this does not include "finished compost." Defendants assert this is so because another paragraph provides that "finished compost" may be sold commencing with the effective date of the consent judgment. Defendants argue, first, that the Court may not re-write the consent judgment; and, second, parole evidence is not allowed, as the contract here is clear.

"A consent judgment is the product of an agreement between the parties." *Sylvania Silica Co v Berlin Twp, 186* Mich App 73, 75; 463 NW2d 129 (1990). An agreement to settle a pending lawsuit is a contract to be governed by the legal principles applicable to the construction and interpretation of contracts. *Walbridge Aldinger Co v Walcon Corp,* 207 Mich App 566, 571; 525 NW2d 489 (1994).

The construction and interpretation of a contract presents a question of law that is reviewed de novo. *Bandit Industries, Inc v Hobbs Int'l, Inc (After Remand),* 463 Mich. 504, 511; 620 NW2d 531 (2001). The goal of contract construction is to determine and enforce the parties' intent from the plain language of the contract itself. *Old Kent Bank v Sobczak,* 243 Mich App 57, 63; 620 NW2d 663 (2000). When determining that the parties' agreement is, the court should read the contract as a whole and give meaning to all the terms contained within the policy. *Heath v State Farm Mut Auto Ins Co,* 255 Mich App 217, 218; 659 NW2d 698 (2002). If contract language is clear and unambiguous, its meaning presents a question of law for the court to determine. *UAW-GM Human Resource Center v KSL Corp,* 228 Mich App 486, 491; 579 NW2d 411 (1998). On the other hand, where the contract language is unclear or susceptible to multiple meanings, interpretation becomes a question of fact. *Id.* Where a contract is not ambiguous, evidence of custom and practice is inadmissible. *Independence Twp v Reliance Building Co,* 175 Mich App 48, 54; 437 NW2d 22 (1989). The failure to define a contract term does not render the contract ambiguous. *Henderson v State Farm Fire & Casualty Co,* 460 Mich. 348, 354; 596 NW2d 190 (1999). Rather, the terms of a contract must be interpreted in accordance with their commonly used meanings. *Id.*

The pertinent paragraphs of the Consent Judgment are set forth as follows:

1. The Defendants, RONALD and DOLORES MICHAELS, shall permanently cease receiving from off-site sources, leaves, grass, yard clippings and other compostible materials at their farm in Macomb Township and the composting also will be closed, as of December 31, 2005.

2. All composting material shall be removed from the composting operation no later than December 31, 2007.

5. Any finished compost may be removed in bulk from the site and sold commencing with the effective date of this Consent Judgment.

Reading the contract as a whole, and applying only reasonable interpretation to its terms, the Court is persuaded that the consent judgment is unambiguous, and stands for the proposition that all compostible/composting/finished compost must be removed by December 31, 2007. If taking the defendants interpretation that "compostible," "composting" and "finished compost" are all distinct terms referring to different materials, this would mean that the defendants agreed to enter into a contract whereby they would accept raw materials for composting then turn around two years later and get rid of those materials – a pointless exercise. That is, if "finished compost" is not included in the term "composting material," defendants agreed to take materials for compost until December 31, 2005, only to have to get rid of half-rotted "composting material" by December 31, 2007. It also does not make sense that defendants would have agreed to getting rid of all "composting material" two years later if two years is not enough of duration to break down the compostible material into finished compost. (And, indeed, defendants argue that only "finished compost" remains at this point in time.) The Court is persuaded the only reasonable interpretation is that "finished compost" falls within the meaning of "compostible material." The Court is persuaded that the word "finished" is included in the fifth paragraph merely to signify that it can be sold at that stage. Thus, the Court is persuaded that the consent judgment reveals that it was the intent of the parties for defendants to have removed all composting materials – including finished compost – by December 31, 2007. Defendants are in breach of the consent judgment.

The next question is what is the proper remedy in such a circumstance. In *Trendell v Solomon,* 178 Mich App 365, 368-369; 443 NW2d 509 (1989), the Court reviewed other states' as well as federal decisions to conclude that once a consent judgment is entered, it has the same force and effect as a litigated judgment, and the proper remedy for its breach by either party is judicial enforcement. (See, also, *Charter Tp of Orion v Prieskorn Golf Enterprises, Inc,* unpublished opinion per curaim (sic) of the Court of Appeals, decided September 7, 1999 [Docket Nos. 204339, 213055], relying on *Trendell.*)

MCL 600.1701, the general contempt statute, permits "[t}he supreme court, circuit courts, and all other courts of record...to punish by fine or imprisonment, or both, persons guilty of any neglect or violation of duty or misconduct" in enumerated circumstances. Those persons and circumstances include parties to actions for disobeying any lawful order, decree, or process of the court. MCL 600.1701(g). The sanction a trial court may impose to punish contemptuous conduct is limited by MCL 600.1715, which provides:

> (1) Except as otherwise provided by law, punishment for contempt may be a fine of not more than $250.00, or imprisonment which, except in those cases where the commitment s for the omission to perform an act or duty which is still within the power of the person to perform shall not exceed 30 days, or both, in the discretion of the court.
>
> (2) If the contempt consists of the omission to perform some act or duty which is still within the power of the person to perform, the imprisonment shall be terminated when the person performs the act or duty or no longer has the power to perform the act or duty which shall be specified in the order of commitment and pays the fine, costs, and

expenses of the proceedings which shall be specified in the order of commitment. [FN12]

When a court seeks to compel a contemnor to comply with its order requiring or forbidding some particular act, the court may use the *coercive* sanctions permitted by civil contempt, including a fine of up to $250.00, a jail term of no more than thirty days that expires when the contemnor purges the contempt, and compensation to others who sustain losses because of the contemptuous conduct. MCL 600.1715; MCL 600.1721; see also *In re Contempt of Auto Club Ins Ass'n,* 243 Mich App 697, 711-712; 624 NW2d 443 (2000). Civil contempt ends when the contemnor complies with the court's order or is no longer able to do so and pays and fines or costs for the contempt proceedings. MCL 600.1715(2). This ability to cure contempt, essentially making other sanctions unnecessary, is why the contemptuous behavior must persist at the time of the contempt hearing in order for the trial court to impose a coercive sanction. *In re Contempt of Auto Club,* at 712.

At the hearing on the current motion, defendants did not (and, in brief, still do not) deny that they have not removed all composting material from their farm. Thus, the Court is persuaded the requisite "preponderance of the evidence standard" has been met. See, *In re Contempt of Auto Club,* at 712. Therefore, the Court finds defendants in civil contempt. Defendants are ordered to pay a fine of $250 per each day after December 31, 2007, that they have not complied with the consent judgment's mandate to remove all composting materials, including "finished compost," each day being a separate act of contempt. The Court further orders that defendants will be ordered held in jail after thirty days from the date of this *Opinion and Order* if they still have not complied with this Court's order by that time. Finally, defendants shall pay plaintiff's cost and fees for bringing the instant motion.

For the foregoing reasons, plaintiff's motion for an order finding Ronald and Delores Michaels in contempt is GRANTED. Defendants shall pay, collectively, a fee of $250 per day after December 31, 2007, that they have not removed all compostible material from their property. It is further ordered that defendants will both serve time in jail after thirty days of this *Opinion and Order* if they have continued to fail to comply with its terms. Finally, the Court orders defendants are liable for plaintiff's fees and costs for bringing the instant motion. Plaintiff shall submit an itemized bill of costs. In compliance with MCR 2.602(A)(3), the Court states this case had been resolved previously and remains CLOSED.

IT IS SO ORDERED.

/s/ Hon. Diane M. Druzinski, Circuit Court Judge

Date: Februar27, 2008

[stamped as a True Copy, CARMELLA SABAUGH, COUNTY CLERK, by Patricia K. Jones, Court Clerk]

101

(2)

No. 08-111

FILED
AUG 20 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

RONALD MICHAELS AND
DELORES MICHAELS,
Petitioners,

v.

TOWNSHIP OF MACOMB,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE STATE OF MICHIGAN SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I

Whether this Court has jurisdiction to review the Petitioners' federal question where Petitioners failed to raise the federal question in the court of first instance and where Petitioners' writ fails to comply with Supreme Court Rule 14.1(g)(i).

II

Whether Petitioners were denied due process under the Fifth Amendment and Fourteenth Amendment due process clauses by a state court order holding Petitioners in contempt for not complying with a consent judgment, imposing fines and incarceration, where: Petitioners admitted the contemptuous behavior; the trial court conducted a site visit to verify Petitioners' contemptuous behavior and where the state court order was designed to compel Petitioners' future compliance with the consent judgment.

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OPINIONS BELOW

The Respondent accepts the Petitioners' statement regarding the opinions below.

JURISDICTION

Petitioners did not raise the federal question in the state court of first instance and therefore the federal question was not timely and properly raised and this Court does not have jurisdiction to review the question on a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Respondent accepts the Petitioners' statement regarding the constitutional provisions at issue in this case.

STATEMENT OF THE CASE

I. INTRODUCTION

For over ten (10) years, the Respondent litigated with Petitioners in state courts over Petitioners' use of their property in the township to conduct an illegal commercial composting operation (leaves, grass, and yard debris). Petitioners attempted to protect their illegal composting business by shielding the same under the Michigan Right to Farm Act ("RTFA"). After a finding by the Michigan Department of Agriculture ("MDA"), that Petitioners were not operating pursuant to the RTFA nor Generally Accepted Agriculture Management Practices ("GAAMP's"); facing environmental violations and enforcement action by the Michigan Department of Environmental Quality ("MDEQ"); three (3) separate appeals to the State Court of Appeals, which resulted in the case being returned to the trial court on January 23, 1998, May 4, 2002, and April 2, 2003; and the State Supreme Court denying Petitioners' application for leave to appeal on December 12, 2003; the Petitioners decided to enter into a settlement agreement. On June 24, 2004, a settlement between the parties was placed on the record in the trial court. Additionally, the parties entered into a written consent judgment entered by the trial court on June 30, 2004.

The consent judgment required the Petitioners' composting site to be closed as of December 31, 2005. All composting materials were to be removed from the site no later than December 31, 2007. To facilitate removal of the material, the consent judgment

provided compost could be removed in bulk from the site and sold commencing with the entry of the consent judgment. Petitioners were allowed to sell the finished compost in order to comply with the provision of the consent judgment that required all composting materials were to be removed from the site no later than December 31, 2007.

On October 27, 2007, the Respondent inquired of Petitioners, through their legal counsel, as to the removal of the compostable materials, compost and restoration of the site. The Respondent did not receive a reply from Petitioners until November 28, 2007 when Petitioners filed a document entitled, satisfaction of consent judgment. Petitioners alleged they complied with the consent judgment.[1] The Respondent filed objections to the satisfaction of consent judgment.

The Petitioners have done little since the entry of the consent judgment to comply with the terms of the judgment requiring the removal of the leaves,

---

[1] Petitioners' claimed that finished compost was not included within the definition of compostable materials or composting materials as those terms are used in the consent judgment. Petitioners' interpretation was without merit given the fact that the leaves, grass and yard debris and other compostable materials have not been removed from the site, but instead have been turned into compost and left on the property. In other words, the leaves, grass and yard debris and other compostable materials have changed form but still remain on the property in a different state, i.e., compost. The consent judgment required that all compostable materials must be removed from the site on or before December 31, 2007. The leaves, grass and yard debris and compostable material remain on site, albeit in a different form.

grass and yard debris, compostable materials/compost from the site. As of January 2, 2008, the Petitioners had mountains of compostable material/compost on the site which on information and belief, exceed 250,000 cubic yards of material.

II. PETITIONERS ACKNOWLEDGED THE CONSENT JUDGMENT REQUIRED THE COMPOST BE REMOVED FROM THE SITE BY DECEMBER 31, 2007

On two (2) occasions, Petitioner, Delores Michaels provided sworn deposition testimony wherein she acknowledged that all compost was required to be removed from the macomb township site by December 31, 2007.

A. DEPOSITION TESTIMONY OF MAY 31, 2006

On May 31, 2006, Delores Michaels was sworn and gave deposition testimony in litigation captioned, *Township of Richmond v Rondigo, LLC*, et al, Case No: 06-1054-CZ, in the Macomb County Circuit Court. Ms. Michaels testified, in part, at her deposition as follows:

Q. Now, you testified this morning that, as of today, all the finished compost is at the King of the Wind Farms. (Macomb Township site.)

A. King of the Wind.

Q. Wind - - has been sold?

A. Yes.

Q. To whom?

A. It would be a Canadian agency, I am not sure because its initials A, R, something.

Q. Who made the arrangements to sell it?

A. I did.

Q. And do you have a contract with them, a written document that shows they have purchased all of this?

A. No.

Q. Just oral?

A. Correct . . .

Q. And my understanding is there is a court order in effect that says you must clear that Macomb site no later than December 31, 2007; is that correct?

A. That is correct.

Q. And, sitting here today, do you - - and I realize it is an estimate, but it is you plan to have all of it finished, so it can be shipped by that time?

A. That is correct.

B. DEPOSITION TESTIMONY OF DECEMBER 7, 2006

On December 7, 2006, Delores Michaels gave sworn deposition testimony in litigation captioned, *Rondigo, LLC v Casco Township*, Case No: CV74775 in the Federal District Court of the Eastern District of Michigan. In her deposition, Ms. Michaels testified as follows:

Q. As of December 31, 2006, you recall having approximately 250,000 cubic yards of material on site at King of the Wind?

A. Correct.

Q. Now, you understand the consent judgment requires that that material, 250,000 cubic yards be taken off-site by the end of 2007, correct?

A. Correct.

Q. And is the 250,000 cubic yards that you have estimated on-site as of October 31, 2000, or 2006 is that material all finished product or is it in various stages of being finished?

A. It is finished product but not all of it has been screened yet.

Q. What is your intent as far as what you are going to do with that material?

A. I am going to sell it.

III. THE RESPONDENT'S MOTION TO FIND PETITIONERS IN CONTEMPT

On January 3, 2008, the Respondent filed a motion to hold the Petitioners in contempt of the consent judgment. The motion was filed in the Macomb County Circuit Court (trial court). Petitioners appeared through their attorney and filed an answer to the Respondent's motion. On January 14, 2008, the trial court held a hearing on the motion. Petitioners were represented by their legal counsel. At the motion hearing, the Petitioners did not contest the fact that there was compost on their property in violation of the consent judgment. App. A-8. The Petitioners failed to raise any issues regarding the court's jurisdiction or violation of due process. Petitioners' defense was confined to sematics i.e. how the consent should be interpreted. At the conclusion of the motion hearing, the trial court took the Respondent's request for relief under advisement.

On February 27, 2008, the trial court issued its opinion and order finding Petitioners in contempt of the consent judgment. The trial court imposed monetary sanctions, and possible incarceration of the Petitioners if they did not remove the compost/compostable materials from the site on or before March 27, 2008. The trial court also awarded the Respondent its costs and attorney fees incurred in

bringing the motion. In the opinion and order, the trial court observed "At the hearing on the current motion, Petitioners did not (and, in brief, still do not) deny that they have not removed all composting materials from their farm." Petitioners' APP. A-10.

IV. THE STATE COURT APPELLATE PROCEEDINGS

A. COURT OF APPEALS

Subsequent to the trial court's February 27, 2008 opinion and order, finding Petitioners in contempt of the consent judgment, the Petitioners did nothing to remove the compost/compostable materials from the site.

Petitioners filed an application for leave to appeal to the Michigan Court of Appeals. On March 28, 2008, the Court of Appeals entered an order reversing the trial court's monetary sanction against Petitioners which exceeded the statutory maximum of $7,500.00, and affirming the finding of Petitioners' contempt.

B. MICHIGAN SUPREME COURT

Petitioners then filed an emergency application for leave to appeal to the Michigan Supreme Court. On April 11, 2008, the Supreme Court entered an Order denying Petitioners' application for leave to appeal.

V. RESPONDENT'S MOTION TO INCARCERATE RONALD AND DELORES MICHAELS

After the Michigan Supreme Court's denial of Petitioner's emergency application for leave to appeal; the Petitioners continued in their refusal to comply with the terms of the consent judgment. The Respondent filed a motion with the trial court to incarcerate Ronald and Delores Michaels.

The Petitioners and Respondent appeared for several motion hearings in the trial court and counsel visited the site on two separate occasions. The end result was that the parties disagreed whether the Petitioners had complied with the consent judgment.

In order to resolve the issue, the trial court conducted a site visit with counsel for the parties on June 30, 2008 at approximately 6:30 p.m. Subsequent to the site visit, the trial court issued an Opinion and order finding Petitioners in contempt and ordering that Petitioners report to the Macomb County Jail. App. A-11.

A. FURTHER STATE COURT APPELLATE PROCEEDINGS

On July 21, 2008, the Petitioners filed a motion for stay of proceedings in the trial court which was denied.

Petitioners then filed an application for leave to appeal, a motion for stay, and a motion for immediate

consideration with the Michigan Court of Appeals. On July 21, 2008, the Michigan Court of Appeals issued an order denying the relief sought by Petitioners.

The Michigan Supreme Court on July 30, 2008, denied Petitioners' emergency application for leave to appeal, ex-parte motion for a stay pending appeal, and application for stay of execution of the trial court order dated August 1, 2008.

VI. PETITIONERS ARE RELEASED FROM CUSTODY

On July 31, 2008, the trial court judge and counsel visited Petitioners' property to determine the extent of Petitioners' efforts to clean-up the site and comply with the consent judgment. Subsequent to the site visit, the trial court determined that Petitioners were making a concerted effort to clean-up the site consistent with the consent judgment. On July 31, 2008, the trial court entered an order releasing the Petitioners from custody after approximately six (6) days of incarceration. The trial judge scheduled weekly site visits to insure that Petitioners continue their clean-up efforts in earnest.

VII. REASONS FOR DENYING THE PETITION

A. PETITIONERS' DID NOT RAISE THE FEDERAL QUESTION IN THE STATE COURT OF FIRST INSTANCE AND THEREFORE THE QUESTION HAS NOT BEEN PRESERVED FOR REVIEW BY THIS COURT

The court of first instance was the Macomb County Circuit Court (trial court). Petitioners' alleged due process violations and claim that the trial court lacked jurisdiction over Petitioners because Respondent failed to comply with state rules applicable to contempt proceedings must have, first, been raised in the trial court. Supreme Court Rule 14.1(g)(i) requires petitioners seeking review of a state court judgment to specify the stage in the proceedings where the federal question sought to be reviewed was raised. Petitioners' application fails to comply with Rule 14.

A review of the trial court January 14, 2008 oral argument on the Respondent's motion to hold Petitioners in contempt confirms that Petitioners did not raise any issues in the trial court relative to jurisdiction or other alleged procedural infirmities. App. A-1. Since Petitioners failed to timely raise the federal question in the court of first instance, this Court does not have jurisdiction to review the question on a writ of certiorari. *Adams v Robertson*, 520 U.S. 83 (1997). In *Adams* this Court granted a petition for certiorari to the Supreme Court of Alabama. However, after briefing it became apparent that the Petitioners failed to establish that they properly presented the

federal question to the Supreme Court of Alabama. The writ was dismissed as improvidently granted.

Petitioners were precluded from raising the federal issue in the Michigan appellate courts for the reason that issues not properly raised before a trial court cannot be raised on appeal absent compelling or extraordinary circumstances. *Napier v Jacobs*, 429 Mich. 222, 414 N.W.2d 862 (1987).

B. PETITIONERS DID NOT CONTEST THEIR FAILURE TO COMPLY WITH THE CONSENT JUDGMENT

The trial court in its February 28, 2008 opinion finding Petitioners in contempt specifically observed that the Petitioners did not deny all composting material was not removed from the Petitioners' property as required by the consent judgment. The trial court found:

> At the hearing on the current motion (Respondent Motion for Contempt) Petitioners did not (and, in brief, still do not) deny that they have not removed all composting material from their farm . . . Petitioner App. A-10.

The trial court is not required to conduct an evidentiary hearing where the contemptuous behavior is admitted. The Petitioners raised a legal issue regarding interpretation of the consent judgment as their defense for failure to comply. The Petitioners never called into question the jurisdiction of the trial court.

C. THE TRIAL COURT PERSONALLY OBSERVED PETITIONERS' CONTEMPTUOUS BEHAVIOR

On June 30, 2008 at 6:30 p.m. the trial court visited Petitioners' property with counsel. At that time the court walked over the site and was driven around the property. The court had the opportunity to fully observe the condition of the property and whether there was compliance with the consent judgment.

The trial court, after the site visit, issued a written opinion and order finding that Petitioners continued to violate the consent judgment and ordered the Petitioners to be incarcerated. The Petitioners were ordered to be incarcerated to a jail term of thirty (30) days or until Petitioners removed the remaining compost material from their property. In other words, the Petitioners had the keys to the jail in their hands. Petitioners could either elect to sit in jail for 30 days or arrange to have the compost material removed from their property and be freed from the order of incarceration.

Petitioners were warned by the trial court since February of 2008 that their failure to comply with the consent judgment would ultimately lead to their incarceration. Petitioners have only themselves to blame for their incarceration.

An order of contempt is in the discretion of the trial court and is reviewed for an abuse of discretion. *People v Ahumanda*, 222 Mich App 612, 564 NW2d 188 (1997). The findings of the trial court regarding

contempt must be affirmed if there is competent evidence to establish those findings. *Cross Co. v UAW Local 115 (AFL-CIO)*, 377 Mich. 202, 139 N.W.2d 694 (1966). Here, the Petitioners admitted that not all of the compost was removed from their property. Additionally, the trial court had the opportunity to personally observe Petitioners had not removed all of the compost from their property which failure is a violation of the consent judgment.[2] Additionally, the trial court's rulings were reviewed and affirmed on four (4) occasions by state appellate courts.

The trial court fashioned an order based on Petitioner's contempt designed to compel future compliance with the court order. The penalties imposed by the trial court were coercive and avoidable through obedience. Neither a jury trial nor proof beyond a reasonable doubt was required. The trial court's sanctions were civil in nature and could be imposed in an ordinary civil proceeding upon notice and opportunity to be heard. *International Union, United Mine Workers of America, et al. v Bagwell*, 512 U.S. 821 (1994).

---

[2] Rather than remove the compost, Petitioners utilized bulldozers and other heavy machinery to spread the compost over the surface of a portion of Petitioners' property. The parties and trial court observed on June 30, 2008, that plastic materials, tree roots, stumps, branches, piles of leaves in various stages of disintegration, and old license plate, plastic and other debris were mixed in the compost and spread across the property. Instead, Petitioners were required to load the compost and compostable materials into trucks and move the material off their property.

VIII. CONCLUSION

For the reasons stated above, the Respondent respectfully requests that this court deny the petition for Writ of Certiorari filed by Petitioners, Ronald and Delores Michaels.

Respectfully submitted:

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Counsel for Respondent, Township of Macomb

STATE OF MICHIGAN

IN THE CIRCUIT COURT
FOR THE COUNTY OF MACOMB

TOWNSHIP OF MACOMB,

Plaintiff,

-vs- **Case No: 95-4372-CZ**

RONALD MICHAELS , et al,

Defendant.

ORAL ARGUMENT

BEFORE THE HONORABLE DIANE M. DRUZINSKI, CIRCUIT COURT JUDGE
Mount Clemens, Michigan - Monday, January 14, 2008

APPEARANCES:

For the Plaintiff: LAWRENCE W. DLOSKI (P29760)
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Robert L. Smith, CSR 5098
Official Court Reporter
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(586)469-5042

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Witnesses:

Exhibits:

Mount Clemens, Michigan
Monday, January 14, 2008
at about 8:39 a.m.

— — —

THE COURT OFFICER: All rise.

The Circuit Court for Macomb County is now in session. the Honorable Diane M. Druzinski presiding. Please turn off all cell phones and pagers per order of the Court.

You may be seated.

THE COURT: Thank you, Jeff.

THE CLERK: Macomb Township versus Michaels.

MR. DLOSKI: Good morning, Your Honor. Lawrence Dloski appearing on behalf of the Township of Macomb.

MR. DAVIS: Good morning, Your Honor. Robert Davis on behalf of the Defendants.

THE COURT: This is a flash from the past.

MR. DLOSKI: Well, Judge, I didn't expect that we would be here today, but unfortunately we are.

As the Court is well aware, after approximately ten years of litigation the Township and Dolores and Ronald Michaels entered into a Consent Judgment on June 30, 2004 to close this site and take - - get ride of all the materials on the site. they did close the site as they were required to on or before December 31st, 2005.

The Consent Judgment provided for two more years to finish the materials and to be able to get them off site. They haven't done that. As of the date of this motion, as we stand here today, there's

approximately - - no one has really quantified it, but approximately 250,000 cubic yards of finish material. there's mountains of it. And I don't believe that the Defendants are contesting that there's raw - - that there's material on site, compost.

What they have taken, Judge, is a position that the Consent Judgment says we don't have to move the compost off the site. It only referred to moving the leaves, the grass, yard clippings and not compost. That position is totally frivolous. It is asserted in bad faith, Judge. It was clear in the Consent Judgment the Michaels had to operate under the - - still had to operate that site in conformance with the Right to Farm Act. The Right to farm act doesn't allow any compost to be sold by a farmer from their site. But that Consent Judgment contained a paragraph that the Michaels could sell compost, the finish product from the site. And the only reason that was put in was because to facilitate taking that compost off site. The Michaels wanted it there to give them another option to get rid of that compost that was on the property.

And Dolores Michaels understood, Judge, exactly what this Consent Judgment required her to do. On May 31st of 2006 she gave a sworn deposition testimony in the case of Richmond Township v Rondigo, LLC pending in this court before Debra Servitto. In that case she was asked, Now, you've testified this morning that as of today all of the finish compost that is at King of the Wind Farm has been sold? Dolores Michaels answered yes.

She was further asked, question, It is - - and my understanding is there is a court order in effect that says you must clear that Macomb site no later

than December 31, 2007? that's this order. The question goes on, Is that correct? Answer, That's correct.

She also gave sworn deposition testimony on the 7th day of December, 2006 in the lawsuit Rondigo, LLC v Casco Township pending in the Federal District Court for the Eastern District of Michigan. At that time I asked her, As of December 31st, 2006, you recall having approximately 250,000 cubic yards of material on site at Kind of the Wind? What's this site. Correct.

Now, you understand the Consent Judgment requires that the 250,000 cubic yard be taken off site by the end of 2007, correct? Answer, correct.

Now, these are attached as Exhibits 9 and 10 to our motion, Judge. They have taken the position that compostable materials doesn't include compost, which again, as I said, that's - - it is asserted in bad faith.

I have attached as Exhibit 12 to the motion deposition transcript from J. D Lindenberg who is one of the preeminent composting experts in the country. His deposition was taken on December 14th, 2007 in Rondigo v Casco Township, the federal district court case. He clearly testified there that compost is a compostable material. In fact, he recommends that compost be mixed in with raw materials in the composting process to control odors and smells.

So, Judge, I think what happened here is she had the compost sold to this Canadian company that she testified to in the dep. That deal fell through. You can't sell it, this material you just can't sell it like she thought she could sell it. However, that's not

your problem and that's not my problem. They entered into a deal. They breached that deal. And now the penalty is contempt, Judge.

I have attached the statutes. I have attached the provisions from the Revised Judicature Act. We're requesting that you find them in contempt. That they each be fined $7,500 as the statute provides, and that both Dolores and Ronald Michaels be incarcerated in the Macomb County Jail until such time as the compost is removed from the site. The statute specifically provides for that, Judge and we ask that you do that.

THE COURT: Thank you, Counsel.

MR. DAVIS: Your Honor, thank you for hearing us.

Your Honor, we submitted a satisfaction of judgment at the end of December when, in fact, the compliance had been met, i.e., there's an admission already that the site has been shut down and all the compostable and composting material have been removed. There is a separate paragraph in the contract, Paragraph 5, that addresses finished compost. The finished compost may be removed from the site as well.

Everything that he offers is parol evidence. He has taken deposition testimony, which I have given you a case that you cannot use in this hearing. This was a contract between two parties. It is not for Larry, I or the Court to rewrite that contract. The language says compostable materials is defined as grass, leaves and other compostable material. The finished compost is addressed in a separate paragraph.

I don't know what happened back then but

they used different terms and they defined them accordingly. As we site here today the only thing on the site is the finished compost. You have testimony from the DEQ that there has been no odors for three years now. The black dirt finished compost is the only thing at the site. That's contemplated different in the contract. The wording was clear. If the parties had wanted to distinguish those terms and defined them, they would have. The only one they defined was compostable material as being the grass, the leaves, the incoming stuff.

MR. DLOSKI: Judge, the other paragraph also refers to composting materials that that's what has to be off site by December 31st, 2007. They claim compostable material doesn't include compost, which is ridiculous. The whole intent of this was to close this down and get if off site. And to the extent that they say composting - - compostable material doesn't include compost we can use her deposition testimony obviously.

MR. DAVIS: No, we can't.

MR. DLOSKI: That's clear evidence of what's going on here, Judge.

MR. DAIVS: No, we can't, Judge. Look at paragraph 5, it uses a different term. It uses finished compost.

THE COURT: I'm going to take it under advisement. This is a 1995 case that has been from here to the Court of Appeals, back to the Court of Appeals, to the Supreme Court and back again. I thought we had tentatively resolved it for good back when the Consent Judgment was entered into. I was not happy to see this on my docket again, and particularly when it appears it is going to boil down

to a matter of semantics.

I will take it under advisement, and I will issue a written opinion. I expect the party that wins to comply with my ruling.

MR. DAVIS: We will do so, Judge.

THE COURT: Do a yellow order staying I'm going to take it under advisement, please.

MR. DAVIS: Yes.

MR. DLOSKI: Yes, Thank you, Judge.

THE COURT: You're very welcome.

(Proceedings concluded at 9:07 a.m.)

CERTIFICATION

STATE OF MICHIGAN)
) SS

I, Robert L. Smith, Official Court Reporter of the Sixteenth Judicial Circuit, State of Michigan, do hereby certify that the foregoing pages comprise a full, true and correct transcript taken in the matter of Macomb Township versus Michaels, et al, Case Number 95-4372-CA, on January 14, 2008.

_____

Robert L. Smith, CSR 5098
Official Court Reporter

Date: 03-05-08

Mount Clemens, Michigan

STATE OF MICHIGAN

IN THE CIRCUIT COURT
FOR THE COUNTY OF MACOMB

TOWNSHIP OF MACOMB,

Plaintiff,

-vs- **Case No: 95-4372-CZ**
DIANE M. DRUZINSKI

RONALD MICHAELS and
DELORES MICHAELS,

Defendant.

OPINION AND ORDER RE
PLAINTIFF'S MOTION FOR
INCARCERATION OF DEFENDANTS
FOR FAILURE TO COMPLY
WITH CONSENT JUDGMENT

Plaintiff filed a motion seeking incarceration of defendants for their failure to comply with the June 24, 2004 consent judgment. The pertinent paragraphs of the consent judgment are as follows:

1. The Defendants, RONALD AND DELORES MICHAELS, shall permanently cease received from off-site sources, leaves, grass, yard clippings and other compostible materials at their farm in Macomb Township and the

composting also will be closed, as of December 31, 2005.

2. All composting material shall be removed from the composting operation no later than December 31, 2007.

5. Any finished compost may be removed in bulk from the site and sold commencing with the effective date of this consent judgment.

In an Opinion and Order dated February 27, 2008 this court found Defendants in civil contempt of the June 24, 2004 consent judgment and assessed monetary sanctions and incarceration in 30 days, if the Defendants failed to comply with the terms of the consent judgement.

The Court of Appeals affirmed this decision, although modifying the monetary sanctions. Defendants application to the Supreme court was denied. Defendants have since paid all fines, attorney fees and costs assessed, but according to Plaintiff, still has not removed all compostible/composting material from their farm, and therefore, Defendants should be incarcerated.

In support of their position Plaintiff provided the court with Exhibits 1 through 5 depicting the current condition of the farm. Specifically alleging a berm of compostible/composting material still remains along the east side of the property, parallel with Card Road. Plaintiff also submitted the written results of a Michigan Department of Environmental Quality site

visit which occurred on June 10, 2008.

In response, Defendants contend they have complied with the consent judgment and incarceration is not warranted. Specifically, Defendants have submitted an Affidavit of their counsel, Ms. Geist, and an Affidavit of Renee Michaels, the Defendants' daughter. Ms. Geists' affidavit asserts that the Defendants are in the process of returning the former composting site to a farm field, are mixing horse manure with topsoil, using a front loader to push soil amendments and are screening topsoil to remove paper and plastic from the site. Ms. Michaels affidavit asserts that all composting materials were removed from the former composting site at the end of last year, it was their intention to plant crops on the clay compost pad where the windrows had been placed and in order to do that, the needed to spread a layer of topsoil over the clay pad and work fertilizing nutrients (manure) into the soil. They began this process this year by pushing up material from the other fields and bringing to the site materials and equipment they would need to accomplish their plan. Ms. Michaels affidavit goes on to state they were told by Plaintiff's counsel to continue spreading "piles" of soil to turn the area into a farm, and as such, workers were told to continue to spread the soil, work the manure into the soil so the area would be ready for crops, and that an on-site screener would be screening soil to remove debris, which is what affiant believed Plaintiff counsel wanted them to do.

There was a site visit in April of 2008 and on June 19, 2008. Both parties, being again unable to

agree on whether Defendants had removed all materials consistent with the June 24, 2004 consent judgment and subsequent to the court's order of February 27, 2008 holding Defendants in contempt, but not imposing incarceration, urged and agreed that this court visit and inspect the site.

On Monday, June 30, 2008, this court went to Defendants' facility, with counsel for both sides present. The court was driven all around the property, and walked the area of the former composting site. The court observed a mound/berm along the east side of the property, parallel with Card Road, which has yard compost on it. Further, this court observed yard compost (leaves) in significant decomposing clumps consistently spread throughout the area of the former composting site. There was an odor associated with the yard compost (leaves). Notwithstanding whatever defendant is doing to rid debris from soil allegedly pushed over from other fields, make the area suitable for farming, addition of nutrients to the soil, etc. none of that activity was contained in nor required by the consent judgment.

This court finds that as of June 30, 2008, Defendants have still not complied with the consent judgment as the berm along the eastern portion of the property, parallel with Card road was not removed and should have been removed by December, 2007. Further that Defendants spread some of the composting material from the berm into the soil for their anticipated farming project. Now, almost 120 days subsequent to the initial finding of contempt, Defendants are still in violation of the court order.

Therefore, the court is ordering the incarceration of Defendants to a jail terms of 30 days or until Defendants have removed the remaining composting material from their property - specifically the berm referenced in this opinion as well as composting material spread into the soil. When and if Defendants believe they have fully complied with this court order, they may contact Plaintiff's counsel to confirm such compliance. Both parties are then instructed to submit a stipulation to that effect. Both parties are urged to expeditiously work with each other and contact the court for a post judgment status conference if the parties are still unable to reconcile whether or not Defendants contemptuous behavior has ceased.

For the foregoing reasons, Plaintiff's Motion to Incarcerate Defendants is GRANTED. Both Defendants shall report to the Macomb County Jail on Tuesday, July 22, 2008 at 9:00 a.m. to begin their sentence. In compliance with MCR 2.602(A)(3), the court states this case has been previously closed and remains CLOSED.

IT IS SO ORDERED

/s/ Hon. Diane M. Druzinski, Circuit Court Judge

Dated: July 18, 2008

[stamped as a True Copy, CARMELLA SABAUGH, COUNTY CLERK, by Patricia K. Jones, Court Clerk]

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(3)

No. 08-111

FILED
SEP 26 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

RONALD MICHAELS AND
DOLORES MICHAELS,

Petitioners,

v.

TOWNSHIP OF MACOMB,

Respondent.

On Petition for a Writ of Certiorari to the State of Michigan Supreme Court

BRIEF IN REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Petitioners Ronald Michaels and Dolores Michaels submit this Reply Brief to address issues raised in the Opposition to Petition for Writ of Certiorari ("Opposition Brief") filed by Respondent the Township of Macomb, Michigan in accordance with Sup. Ct. R. 15.6 permitting a reply brief for that purpose.

Respondent's Opposition Brief focuses on matters which occurred after Petitioners filed their petition for a writ of certiorari, particularly the decision of the Macomb County Circuit Court ("the circuit court") on July 18, 2008 ordering that Petitioners be incarcerated. While Respondent's Opposition Brief is replete with factual misstatements unsupported by record evidence, it does not address the constitutionality of the circuit court's deprivation of Petitioners' constitutional rights. Instead, Respondent argues that Petitioners were not entitled to due process and questions this Court's jurisdiction to review this petition.

In the Introduction Respondent sets forth its version of the underlying litigation, which began in 1995. While Respondent asserts that Petitioners' commercial composting operation was "illegal," importantly no tribunal ever agreed with Respondent or found that Petitioners' operation was illegal in any way. Indeed, Respondent had brought the underlying action merely as a nuisance claim. Compliance with the Michigan Right To Farm Act ("RFTA"), codified as M.C.L. 286.471 *et seq.*, and the Generally Accepted Agriculture Management Practices ("GAAMPs"), developed pursuant to the RFTA, is voluntary, not mandatory. It simply offers Michigan farmers a bar against nuisance lawsuits. There are no penalties for non-compliance, as it does not violate any law.

While Respondent claims that the Michigan Department of Environmental Quality issued environmental violations and took enforcement action against Petitioners, Respondent neglects to mention that the purported enforcement action (Case No. 2004-451-CE) was dismissed with prejudice by the Ingham County, Michigan Circuit Court, with **no** finding of liability whatsoever on the part of Petitioners and no imposition of fines, penalties or other punitive or remedial action.

Although Respondent asserts that Petitioners have done little to comply with the consent judgment, its only "support" is the deposition testimony of Petitioner Dolores Michaels taken on **December 7, 2006** in a completely unrelated case, in which she stated that she had approximately 250,000 cubic yards of finished compost on the site as of October 31, 2006. On **January 3, 2008**, Respondent filed its motion for contempt based on this testimony of *fourteen months earlier*, and claimed that "upon information and belief" that same material was still there after December 31, 2007. Respondent did absolutely nothing to verify that there was anything on site on January 1, 2008, and neither Respondent's counsel nor anyone from the Township ever visited the site at all until four months later.

After Petitioners filed their petition with this Court, Respondent brought a motion to incarcerate Petitioners, asserting again that they failed to comply with the consent judgment (Reply App., 1a – 4a). As with Respondent's first contempt motion, this motion failed to comply with the state court rules governing contempt proceedings. The circuit court lacked jurisdiction to consider the motions and abused its discretion and violated Petitioners' due process rights when it held Petitioners in contempt of court and when it

ordered Petitioners incarcerated without an evidentiary hearing or a determination as to whether Petitioners could comply with the contempt orders or the character and magnitude of the harm threatened by continued contumacy.

REPLY STATEMENT OF FACTS

1. Petitioners incorporate the Statement of Facts from their Petition for Writ of Certiorari herein by reference.

2. On March 28, 2008, Respondent filed with the Macomb County Circuit Court a motion to incarcerate Petitioners, stating that, "[o]n information and belief, Defendants [Petitioners] have done nothing to comply with this court's order requiring Defendants to remove all compostable materials from their property in Macomb Township" (Reply App., 1a – 4a). No affidavit or other evidence supported this motion. It merely contained unsworn assertions made by counsel for Respondent, who had never at any time even been to the site. The circuit court never held an evidentiary hearing on Respondent's allegations.

3. On April 9, 2008, Petitioners filed their response (Reply App., 5a – 19a), which points out the complete lack of evidence supporting Respondent's motion, and raises the circuit court's lack of jurisdiction to consider the motion and the violation of their due process rights. The circuit court ignored these constitutional concerns and ordered Petitioners incarcerated for 30 days (Opposition Brief, App. at 11a - 15a). Despite the record evidence that the alleged compostable materials on the site were brought on after December 31, 2007 from the almost 300 non-composting site-acres of the farm to turn the former 30-acre composting site into a planted farm field, the circuit court

held that the presence of leaves on the site (which is next to a forest) violated the consent judgment. The order itself contains factual errors, such as mandating that a "berm" parallel and right next to "Card Road" be removed, even though Card Road does not run parallel to the property and is a mile away from the site, making compliance with the order utterly impossible.

REASONS FOR GRANTING THE PETITION

This Court has long upheld the guarantees in the Fifth and Fourteenth Amendments to the United States Constitution that a person shall not be deprived of liberty or property without due process of law. These guarantees extend to proceedings alleging contempt outside the immediate presence of a court, particularly where the penalties include incarceration.

Yet it is undisputed that Petitioners were deprived of their property through monetary fines and their liberty through incarceration without the circuit court ever holding an evidentiary hearing or having before it any evidence whatsoever to support Respondent's allegations that Petitioners were in contempt of a term in the consent judgment. Petitioners have no other recourse for this deprivation of their constitutional rights except through review by this Court. The state court rulings in this case clearly decide an important question of federal constitutional law in a way that directly conflicts with decisions of this Court, and accordingly, Petitioners respectfully request that this Court grant their petition.

I. THE DECISION BELOW DIRECTLY CONFLICTS WITH THE RULINGS OF THIS COURT

In their petition, Petitioners maintained that Michigan's failure to hold an evidentiary hearing or require the submission of relevant and admissible evidence before finding Petitioners in contempt for allegedly not complying with a term in the consent judgment is incompatible with this Court's decisions upholding the guarantees found in the Fifth and Fourteenth Amendment of due process in contempt proceedings.

Respondent's Opposition Brief never addresses this issue. Instead, Respondent sets forth a lengthy recitation of "facts" (with which Petitioners disagree) unrelated to whether Michigan's failure to hold any kind of evidentiary hearing - or afford even the slightest measure of due process to Petitioners - was incompatible with this Court's decisions upholding the constitutional guarantees of due process in state court contempt proceedings. Respondent also does not address this Court's rulings as to the requisite due process for contempt allegedly occurring outside the immediate presence of a court. This Court has stated that "[s]ummary adjudication of indirect contempts is prohibited." *Int'l Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 833 (1994) (citing *Cooke v. United States*, 267 U.S. 517, 534 (1925)). This Court affirmed in *Pounders v. Watson*, 521 U.S. 982 (1997), that a party facing a charge of contempt is entitled to due process through a hearing, the presence of counsel and an opportunity to call and examine witnesses. In prior rulings this Court limited summary contempt orders, in which the party is not afforded a due process evidentiary hearing, only to cases in which the party

committed misconduct in the presence of the court which disturbed the court's business. *See Pounders* (and cases cited therein at 521 U.S. at 988). This Court's rulings clearly provide that Petitioners were entitled to due process before the circuit court found them in contempt and ordered that they be fine and incarcerated.

The circuit court's order on July 18, 2008 that Petitioners be incarcerated for 30 days cannot be seen as anything other than a criminal sanction under this Court's decisions in *Bagwell*, 512 U.S. at 826-27 and *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911). Respondent admits that Petitioners were not afforded an evidentiary hearing, but asserts that the circuit court was not required to conduct an evidentiary hearing because Petitioners admitted the contempt. Petitioners never made any such admission. Indeed, the only evidence in the record is the unrebutted affidavit of Renee Michaels which proves a lack of contempt. Respondent does not contend that Petitioners themselves made the alleged "admission," but instead refers to what at best could be described as a comment purportedly made by counsel at a motion hearing, which cannot be viewed as evidence.

More importantly, Respondent fails to cite any legal authority for this contention. Respondent's position directly conflicts with this Court's decision in *Pounders*. Even where a defendant has confessed to a crime, that defendant is still entitled to due process and a trial by jury. This Court has never held that a criminal defendant's confession renders a jury trial unnecessary or permits a summary conviction and sentencing without benefit of a jury trial or other due process. There simply is no authority which supports Respondent's argument that Petitioners were not entitled to due process.

Since Respondent does not address the fact that Michigan's failure to hold an evidentiary hearing or require that the record contain any relevant and admissible evidence before finding Petitioners in contempt for allegedly not complying with a term in the consent judgment is incompatible with this Court's decisions upholding the guarantees found in the Fifth and Fourteenth Amendment of due process in contempt proceedings, Petitioners' basis for submitting their petition to this Court remains uncontroverted. Petitioners therefore respectfully request that this Court grant their petition.

II. THIS COURT SHOULD GRANT REVIEW TO HALT MICHIGAN'S UNCONSTITUTIONAL FINDING OF CONTEMPT WITHOUT DUE PROCESS AND BECAUSE THE DECISION BELOW IS WRONG

A. The Circuit Court Lacked Jurisdiction Over Petitioners Because Respondent Failed To Comply With The State Court Rules As To Contempt Proceedings

As with its earlier motion, Respondent again failed to comply with M.C.R. 3.606 when it brought its motion to incarcerate Petitioners. Under M.C.R. 3.606, a contempt proceeding must be initiated by an ex parte motion supported by affidavits, from which the court orders the accused contemnor to show cause there should not be a finding of contempt. *In re Contempt of Robertson*, 209 Mich. App. 433, 438-39, 531 N.W.2d 763 (1995); *In re Contempt of McRipley*, 204 Mich. App. 298, 301, 514 N.W.2d 219 (1994); *In re Contempt of Nathan*, 99 Mich. App. 492, 495, 297 N.W.2d 646 (1980). But in this case, Respondent had

no supporting affidavits, nor did an order to show cause issue, as required by M.C.R. 3.606(A). Instead, Respondent merely alleges "upon information and belief" that Petitioners are in contempt of the consent judgment. This procedural failure in both contempt proceedings is fatal and compels a ruling that the circuit court lacked jurisdiction over both motions seeking an order holding Petitioners in contempt. *S. Abraham & Sons, Inc. v. Dept. of Treas.*, 260 Mich. App. 1, 24 n. 11, 677 N.W.2d 31 (2003). Under Michigan law, lack of subject matter jurisdiction renders a judgment void. *In re Hatcher,* 443 Mich. 426, 438, 505 N.W.2d 834 (1994); *In re Hague,* 412 Mich. 532, 315 N.W.2d 524 (1982).

Additionally, Respondent committed other procedural defects in its motion. Respondent's motion did not state whether the alleged contempt was criminal or civil in nature; Respondent failed to serve its motion on Petitioners personally. These constitute procedural defects which taint the proceeding and mandate that the orders of contempt be reversed. *S. Abraham & Sons, Inc.*, 260 Mich. App. at 24 n.11; *In re Contempt of Steingold*, 244 Mich. App. 153, 158, 624 N.W.2d 504 (2000); *In re Contempt of Auto Club Ins Ass'n*, 243 Mich. App. 697, 716, 624 N.W.2d 443 (2000); *In re Contempt of Robertson,* 209 Mich. App. at 438.

Respondent never addresses whether the circuit court had jurisdiction to hear either contempt motion, but instead, argues that Petitioners failed to raise the issue with the circuit court and that this Court accordingly has no jurisdiction. This argument lacks any merit. Review of Petitioners' response to Respondent's motion (Reply App. at 5a – 19a) shows that Petitioners did raise these constitutional concerns with the circuit court, which simply ignored them.

As Respondent's only argument on this issue is without record support, Petitioners' submission that the circuit court lacked jurisdiction remains uncontroverted. Accordingly, Petitioners respectfully request that this Court grant their petition.

B. The Circuit Court Abused Its Discretion And Violated Petitioners' Due Process Rights When It Ordered Incarceration Absent An Evidentiary Hearing

Under Michigan law, contempt of court is a willful act, omission, or statement that tends to impair the authority or impede the functioning of a court. *In re Contempt of Auto Club Ins. Ass'n.*, 243 Mich. App. at 697; *In re Contempt of Robertson*, 209 Mich. App. at 436; *Pontiac v. Grimaldi*, 153 Mich. App. 212, 215, 395 N.W.2d 47 (1986). A trial court must afford the alleged contemnor due process before it can hold a party in contempt. *In re Collins*, 329 Mich. 192, 196, 45 N.W.2d 31 (1950); *In re Contempt of Auto Club Ins. Ass'n.*, 243 Mich. App. at 711-13; *In re Contempt of Robertson*, 209 Mich. App. at 438, 440; *Fraternal Order of Police, Lodge #98 v. Kalamazoo Co.*, 82 Mich. App. 312, 315-16, 266 N.W.2d 805 (1978); *In re Henry*, 32 Mich. App. 654, 659, 189 N.W.2d 96 (1971).

The hearing in a contempt proceeding must be more than a summary proceeding or oral argument of counsel on a motion, and must employ the rules of evidence. *In re Contempt of Robertson*, 209 Mich. App. at 439. The standard of proof is more stringent than in other civil actions; proof must be clear and unequivocal. *People v. Matish*, 384 Mich. 568, 572, 1984 N.W.2d 915 (1971); *In re Contempt of*

Robertson, 209 Mich. App. at 439; *Detroit Bd. of Ed. v. Detroit Federation of Teachers*, 55 Mich. App. 499, 505-06, 223 N.W.2d 23 (1974). Thus, where an order of contempt was based on the representations of the plaintiff's counsel made at a motion hearing (as Respondent alleges occurred in this case) instead of issuing after an evidentiary hearing, the state court found that there was not sufficient evidence to support the order of contempt because the factfinder could not gain personal knowledge of the contempt. *In re Contempt of Robertson*, 209 Mich. App. at 440-41.

It is undisputed in this case that the circuit court did not hold an evidentiary hearing before holding Petitioners in contempt on February 27, 2008 order or ordering their incarceration on July 18, 2008. The circuit court had no evidence before it to support Respondent's motions. Although the circuit court went to the site, it did not take any evidence or conduct any proceeding there. There was nothing in the record to refute the sworn affidavit of Renee Michaels that the material present on the site at the time of the circuit court's visit (more than six months after Petitioners had fulfilled the consent judgment and had begun to reclaim the land as a farm field) was fertilizing material brought on the site in 2008 from other parts of the farm (as the circuit court's opinion reflects), an action which would not violate the consent judgment.

Notwithstanding the complete lack of evidence, the circuit court determined that there was a "berm" parallel and next to "Card Road" that had "yard compost" in it, and that "yard compost" was spread throughout the area (this term does not appear in the consent judgment). However, there could not be a berm parallel to Card Road on Petitioners' site

- the 30-acre parcel is parallel to North Avenue, not Card Road, which is a mile away from the site. There was no evidence that a "berm" of "yard compost" was present on January 1, 2008 and or that anything on site was "compostable material" from the "composting operation." Indeed, nothing in the consent judgment prohibits Petitioners from reclaiming the site by turning it into a field for crop production. There was no evidence from which the circuit court could rule that Petitioners be held in contempt and fined or incarcerated.

Likewise, because of the lack of evidence the circuit court could not know whether it was possible for Petitioners to comply with its orders, particularly the incarceration order. Since the order's own language as to "Card Road" made compliance impossible (the circuit court never amended or corrected that order), the order can only be seen as punitive and the proceedings criminal in nature. Petitioners thus were entitled to the heightened constitutional protections beyond an evidentiary hearing as afforded in criminal proceedings, such as a jury trial.

Respondent does not counter this position, but instead argues that the circuit court personally observed the "contempt" when it conducted a site visit on June 30, 2008, perhaps trying to analogize to a "direct" contempt. But the alleged contempt still would not have occurred in open court in the court's immediate presence, disrupting the court's business, as required in this Court's decision in *Pounders*. Respondent bore the burden of proving Petitioners' contempt, but failed to meet this burden. Even the circuit court's visit on June 30, 2008 could not establish whether compostable materials were present on the site on January 1, 2008, nor could it rebut the affidavit.

Accordingly, because the circuit court did not afford Petitioners due process by conducting an evidentiary hearing or receiving evidence supporting either contempt motion, the circuit court abused its discretion and violated Petitioners' constitutional rights. Petitioners therefore respectfully request that this Court grant their petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioners
Ronald Michaels and Dolores Michaels

SEPTEMBER 2008

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

MACOMB TOWNSHIP,

Plaintiff,

Case No. 95-4372-CZ

v

Honorable Diane Druzinski

RONALD MICHAELS AND DOLORES MICHAELS,

Defendants.

TOWNSHIP OF MACOMB'S MOTION FOR ORDER INCARCERATING RONALD AND DOLORES MICHAELS AND REQUIRING DEFENDANTS REIMBURSE TOWNSHIP'S FEES AND COSTS

The Township of Macomb ("Township"), by and though its attorneys, Seibert and Dloski, PLLC, for its motion states as follows:

1. On February 27, 2008, this court issued an Opinion and Order finding Ronald and Dolores Michaels in contempt of the June 30, 2004 consent judgment.

2. The court's Opinion and Order, in part, stated as follows:

> For the foregoing reasons, Plaintiff's motion for an order finding Ronald and Dolores Michaels in contempt is GRANTED. Defendants shall pay, collectively, a fee of $250.00 per day after December 31, 2007 that they have not removed all compostable materials from their property. It is further ordered that Defendants shall both serve time in jail after thirty (30) days of this Opinion and Order if they have continued to fail to comply with its terms. Finally, the court orders Defendants are liable for Plaintiff's fees and costs for bringing the instant motion. Plaintiff shall submit an itemized bill of costs.

3. On information and belief, Defendants have done nothing to comply with this court's order requiring Defendants to remove all compostable materials from their property in Macomb Township.

4. Instead, Defendants on or about March 7, 2008 filed a Claim of Appeal with the Court of Appeals.

5. With Defendants' Claim of Appeal, Defendants filed a Motion for Peremptory Reversal, Motion for Stay, and Motion to Waive the Transcript Requirements.

6. Defendants also filed a Motion for Stay of Proceedings with this court.

7. On March 17, 2008, this court heard argument on Defendants' Motion for a Stay of Proceedings. The court entered an order denying Defendants' motion for a stay.

8. On March 27, 2008, the Court of Appeals entered an order dismissing Defendants' Claim of Appeal, Motion for Immediate Consideration, Motion for Peremptory Reversal, Motion for Stay and Motion to Waive the Transcript Requirement. The Court of Appeals' order is attached as Exhibit 1.

9. The basis for the Court of Appeals' order dismissing Defendants' pleadings based on the fact that this court's Opinion and Order finding Defendants in contempt was not a final order.

10. Presumably, Defendants will now file an Application for Leave to the Court of Appeals. However, it is apparent that Defendants' Application for Leave to Appeal, if filed, will have no merit.

11. Defendants made the Court of Appeals well aware that Defendants would be subject to incarceration commencing March 27, 2008. If the Court of Appeals felt there was any merit to Defendants' position, the Court of Appeals could have treated Defendants' Claim of Appeal as an Application for Leave to Appeal and grant the application. The fact that the Court of Appeals chose not to proceed in that manner is very significant evidence that the Court of Appeals would not entertain Defendants' Application for Leave to Appeal.

12. On March 28, 2008, Defendants filed an emergency motion for leave to appeal with the Court of Appeals.

13. Counsel for the Township was advised by the Court of Appeals that the court would decide the application on March 28, 2008, and the Township should have a response to the Court of Appeals no later than 1:00 p.m. on March 28, 2008.

14. On March 28, 2008, at approximately 4:00 p.m., the Court of Appeals, by facsimile, issued an order denying Defendants' application for leave to appeal. The Order is attached as Exhibit 2.

15. The Court of Appeals affirmed this court's finding that Defendants were in contempt for failure to comply with the consent judgment.

16. The Township filed an itemized bill of costs.

17. Defendants filed objections to the Township's bill of costs.

18. Defendants' objections are based on the fact that "Dloski was very familiar with the facts and proceedings that led up to preparation for the motion for contempt." Defendants' objections are without merit and frivolous, as usual.

WHEREFORE, Macomb Township respectfully requests this court enter an order incarcerating Ronald and Dolores Michaels and requiring Defendants to reimburse the Township's fees and costs within seven (7) days from the motion hearing date.

/s/ Lawrence W. Dloski
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Attorney for Plaintiff
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(586) 469-3800

Dated: March 28, 2008

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

MACOMB TOWNSHIP,

Plaintiff,

Case No. 95-4372-CZ

v

Honorable Diane Druzinski

RONALD MICHAELS and DOLORES MICHAELS,

Defendants.

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION TO INCARCERATE DEFENDANTS RONALD MICHAELS AND DOLORES MICHAELS

Defendants, Ronald Michaels and Dolores Michaels, by and through their counsel, The Victor Firm, PLLC, hereby submit this response to plaintiff, Township of Macomb's motion to incarcerate defendants, and in response to Plaintiff's motion, state as follows:

1. Admit that this Court's February 27, 2008 Opinion and Order speaks for itself.

2. Admit that this Court's February 27, 2008 Opinion and Order speaks for itself. Defendants further aver that the Court of Appeals, in its March 28, 2008 Opinion modified the Circuit Court ruling.

3. Denied.

4. Defendants admit that they filed a Claim of Appeal with the Court of Appeals on March 7, 2008, which Claim of Appeal was dismissed for lack of jurisdiction. Defendants then filed on March 28, 2008, an Application for Leave to Appeal to the Court of Appeals, which Application was granted by Order dated March 28, 2008, modifying in part the trial court's Opinion and Order.

5. Defendants admit that they filed on March 11, 2008, a Motion for Peremptory Reversal, and filed on March 18, 2008, a Motion for Stay of Proceedings and a Motion to Waive the Transcript Requirement.

6. Defendants admit that on March 10, 2008, defendants filed a Motion for Stay of Proceedings with this Honorable Court.

7. Defendants admit that on March 17, 2008, this Honorable Court denied Defendants' Motion for Stay of Proceedings.

8. Defendants admit that their Claim of Appeal with the Court of Appeals was dismissed for lack of jurisdiction on March 27, 2008.

9. Defendants admit that the Court of Appeal's March 27, 2008 Order speaks for itself.

10. Defendants admit that part of the allegation which states that an Application for Leave to Appeal will be, and was indeed, filed on March 28, 2008. The Application for Leave to Appeal was granted by Order dated March 28,

2008, modifying, in part, the trial court's Opinion and Order. Defendants deny that part of the allegation which states the Application for Leave to Appeal "will have no merit".

11. Defendants deny plaintiff's allegations in total.

12. Defendants admit they filed an emergency motion for leave to appeal with the Court of Appeals on March 28, 2008.

13. Defendants neither admit nor deny the allegations contained herein for the reason they lack knowledge or information sufficient to form a belief, and leave plaintiff to its proofs.

14. Defendants admit the Court of Appeals issued its order modifying, in part, the trial court's February 27, 2008 opinion and order, and the Court of Appeals March 28, 2008 Order speaks for itself.

15. Denied. Defendants aver the Court of Appeals March 28, 2008, Order modifying, in part, the trial court's February 27, 2008 opinion and order speaks for itself.

16. Defendants admit plaintiff filed an itemized Bill of Costs, which Bill of Costs was not verified.

17. Defendants admit that on March 21, 2008, Defendants file objections to plaintiff's Bill of Costs.

18. Defendants deny the allegations as stated herein for the reason they are untrue as alleged. Defendants objected to plaintiff's Bill of Costs for the reason same were unverified, as required by MCR 2.625(G), and, further, it

contains no statement averring that the facts and allegations contained in the submitted Bill of Costs are true, or believed to be true, upon information and belief and under penalty of perjury. Defendants further objected for the reason the fees charged were excessive. (A copy of Defendants' Objections to Plaintiff's Bill of Costs is currently on file with this Honorable Court and will, therefore, be omitted from this motion response.)

WHEREFORE, Defendants, Ronald Michaels and Dolores Michaels, respectfully request that this Honorable Court deny plaintiff's request for an order (a) incarcerating Ronald and Delores Michaels, and (b) requiring Defendants to reimburse the Township fees and costs within seven (7) days from the motion hearing date.

/s/ Cindy Rhodes Victor
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Attorneys for Defendants
Ronald and Delores Michaels

Dated: April 8, 2008

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

MACOMB TOWNSHIP,

Plaintiff,

Case No. 95-4372-CZ

v

Honorable Diane Druzinski

RONALD MICHAELS and DOLORES MICHAELS,

Defendants.

DEFENDANTS' BRIEF IN RESPONSE TO PLAINTIFF'S MOTION TO INCARCERATE DEFENDANTS RONALD MICHAELS AND DOLORES MICHAELS

STATEMENT OF FACTS

On February 27, 2008, this Court issued an Opinion and Order holding that defendants Ronald Michaels and Dolores Michaels ("defendants") were in contempt of court. The Opinion and Order provided for incarceration if defendants were still in contempt after 30 days from the date of the order.

On March 31, 2008, plaintiff filed this instant motion for incarceration. The only allegation that plaintiff asserts in bringing the instant motion is the following:

> 3. On information and belief, Defendants have done nothing to comply with this court's order requiring Defendants to remove all compostable materials from their property in Macomb Township.

Plaintiff attaches no affidavit, photographs, or other tangible evidence to its motion, nor does plaintiff provide the names of any witnesses who could attest to the allegation contained in Paragraph 3. Plaintiff's contention is unsupported by the record, and is untrue.

Defendants have been diligently working on complying with this Court's order. As evidence of this compliance, defendants attach photographs taken of the Rondigo farm site. The photographs attached hereto as "Exhibit A" evidence the state of the farm in 2004, before this Honorable Court issued its February 27, 2008 Opinion and Order. The photographs attached hereto as "Exhibit B" were taken on April 5, 2008, and evidence that defendants are in compliance with this Court's February 27, 2008 Opinion and Order. Defendants state unequivocally that all compostable materials have been removed from the site.

DISCUSSION

I. PLAINTIFF HAS FAILED TO ATTACH EVIDENCE OF ALLEGED CONTINUING CONTEMPT BY DEFENDANTS IN ORDER TO SUPPORT ITS MOTION FOR INCARCERATION OF DEFENDANTS JUSTIFYING DENIAL OF THE MOTION

The only allegation that plaintiff asserts in bringing the instant motion is the following:

> 3. On information and belief, Defendants have done nothing to comply with this court's order requiring Defendants to remove all compostable materials from their property in Macomb Township.

There is no evidentiary basis upon which this Honorable Court may find that defendants continue to be in contempt of court, mandating incarceration as plaintiff requests. Plaintiff's motion fails to contain documentary support from anyone with first-hand knowledge of the facts; the motion contains no affidavit evidence in support of plaintiff's contention, and plaintiff fails to attach photographs or any other documentary evidence from which this Court may find defendants to be in contempt of court. There is no evidence before this Court to support plaintiff's assertion that defendants have not purged the contempt. Accordingly, defendants request this Honorable Court deny plaintiff's motion in its entirety.

II. THIS COURT LACKS JURISDICTION OVER DEFENDANTS SINCE PLAINTIFF FAILED TO COMPLY WITH MCR 3.606 AND OTHER PROCEDURAL REQUIREMENTS

In the event this Honorable Court addresses plaintiff's motion for contempt, considering the assertion that defendants should be held in contempt, defendants submit the motion should be denied in its entirety. Plaintiff has failed to follow the procedures set forth in MCR 3.606 which govern findings of contempt of court. When an alleged contempt of court is committed outside the immediate presence of the court, a party must institute the contempt proceedings with a motion to show cause or support its motion for contempt with an affidavit. Plaintiff has not done so.

Additionally, plaintiff did not fulfill its obligation to advise defendants as to whether the contempt being alleged was criminal or civil in nature. Further, plaintiff did not serve its motion by personal service on defendants, the alleged contemnors, as required when the alleged contempt consists of disobeying an order of the court.

As the court stated in *In re Contempt of Robertson*, 209 Mich App 433; 531 NW2d 763 (1995),

> Contempt proceedings for contempts committed outside the immediate view and presence of the [judge] must be initiated through an ex parte motion supported by an affidavit of facts showing the alleged contemptuous conduct. MCR 3.606(A).

209 Mich App at 438-39. *Accord In re Contempt of McRipley*, 204 Mich App 298, 301; 514 NW2d 219 (1994); *In re Contempt of Nathan*, 99 Mich App 492, 495; 297 NW2d 646 (1980). No such affidavit is attached to plaintiff's motion.

The Court of Appeals in *S. Abraham & Sons, Inc v Dept of Treas*, 260 Mich App 1; 677 NW2d 31 (2003), addressed this very issue, and determined:

> Defendant's alleged disobedience of the Court of Claims order occurred outside the court's presence, requiring compliance with the procedures detailed in MCR 3.606. *Auto Club Ins Ass'n, supra* at 712-713, 718; see also MCL 600.1711. Contrary to MCR 3.606, plaintiffs did not institute the contempt proceedings with a motion to show cause or support their motions for contempt with affidavits (other than an affidavit supporting the amount of attorneys fees requested). As such, the trial court lacked jurisdiction over defendant.

260 Mich App at 24 n.11.

The court in *S. Abraham & Sons, Inc.* also addressed the issues of whether the failure of the plaintiffs in that case to fulfill their obligation to advise the defendant whether the contempt being alleged was civil or criminal in nature and to serve the contempt motion on defendant personally were procedural defects that tainted the contempt hearing,

mandating that the order of contempt be reversed. 260 Mich App at 24 n.11. *Accord In re Contempt of Auto Club Ins Ass'n*, 243 Mich App 697, 716; 624 NW2d 443 (2000); *In re Contempt of Robertson,* 209 Mich App 433, 438; 531 NW2d 763 (1995). The court stated specifically in *In re Contempt of Steingold*, 244 Mich App 153; 624 NW2d 504 (2000):

> Additionally, when contempt proceedings for violating a court order are initiated, the notice or order must be personally served on the alleged contemnor. MCL 600.1968(4); MSA 27A.1968(4); MCR 2.107(B)(1)(b).

244 Mich App at 158.

The proof of service on plaintiff's current motion, including notice of hearing and motion, does not state who was served, and declares that service was made by ordinary mail and by facsimile. Accordingly, defendants submit plaintiff did not appropriately initiate contempt proceedings by filing a motion for an order compelling defendants to show cause as to why defendants should not be held in contempt. That fact, coupled with that lack of an affidavit of someone with personal knowledge respecting the alleged continued contempt as MCR 3.606 requires fatally flaws plaintiff's motion.

Moreover, plaintiff did not state anywhere in its motion whether it the contempt it alleged that defendants committed was civil or criminal in nature and did not personally serve defendants with the contempt motion. Pursuant to . *Williams v Shin,* 111 Mich App 84, 90; 314 NW2d 529 (1981), this Court lacks jurisdiction over

defendants. When a court is without jurisdiction of the subject matter, any action with respect to such a cause, other than to dismiss it, is absolutely void. *Williams*, at 90; 314 NW2d 529 (1981).

Defendants therefore respectfully request that this Court dismiss plaintiff's motion for lack of jurisdiction, award *defendants* their costs and attorneys' fees for having to defend this improper and vexatious motion, together with such other and further relief as to this Court may seem just and proper under the circumstances.

III. PLAINTIFF'S MOTION VIOLATES DEFENDANTS' CONSTITUTIONAL RIGHT TO DUE PROCESS

In the event this Honorable Court addresses the merits of Plaintiff's motion for contempt, considering the assertion that defendants should be held in contempt and incarcerated for alleged continued contempt, defendants submit the motion should be denied in its entirety. Contempt of court is a willful act, omission, or statement that tends to impair the authority or impede the functioning of a court. *In re Contempt of Robertson*, 209 Mich App 433, 436; 531 NW2d 763 (1995); *Pontiac v Grimaldi*, 153 Mich App 212, 215; 395 NW2d 47 (1986). As the court stated in *In re Contempt of Auto Club Ins Ass'n*, 243 Mich App 697; 624 NW2d 443 (2000),

> The power to hold a party, attorney, or other person in contempt is the ultimate sanction the trial court has within its arsenal, allowing it to punish past transgressions, compel future adherence to the rules of engagement, *i.e.*, the court rules and court orders, or compensate

> the complainant. *In re Contempt of Robertson*, [*supra*].... Because the power to hold a party in contempt is so great, it "carries with it the equally great responsibility to apply it judiciously and only when the contempt is clearly and unequivocally shown."

243 Mich App at 708 (*citing People v Matish*, 384 Mich 568, 572; 184 NW2d 915 (1971)). The court made clear that

> The trial court must carry out the proper procedures before it can issue the order holding an individual or party in contempt of court in order to carry out its goal of *coercing* particular action or *punishing* a misdeed.

243 Mich App at 711 (emphasis in original).

According to the court in *In re Contempt of Auto Club Ins Ass'n*,

> If the contemptuous conduct occurs outside the court's direct view, *i.e.*, it is "indirect" contempt, the court must hold a hearing to determine whether the alleged contemnor actually committed contempt. This hearing must follow the procedures established in MCR 3.606 and afford some measure of due process before the court can determine whether there is sufficient evidence of contempt to warrant sanctions.

243 Mich App at 712-13. *Accord In re Collins*, 329 Mich 192, 196; 45 NW2d 31 (1950); *In re Contempt of Robertson*, 209 Mich App 433, 438, 440; 531 NW2d 763 (1995);

Fraternal Order of Police, Lodge #98 v Kalamazoo Co, 82 Mich App 312, 315-16; 266 NW2d 805 (1978); *In re Henry*, 32 Mich App 654, 659; 189 NW2d 96 (1971). In *In re Contempt of Robinson*, the court stated:

> These minimal due process safeguards require that an accused be given a reasonable time in which to prepare a defense to the contempt charge.

209 Mich App at 438.

The hearing on an allegation of contempt must be more than summary proceeding or hearing on a motion; the rules of evidence apply at the hearing regarding the contempt charges. *In re Contempt of Robertson*, 209 Mich App at 439. The standard of proof is more stringent than in other civil actions; proof of contempt must be clear and unequivocal. *People v Matish*, 384 Mich 568, 572, 1984 NW2d 915 (1971); *In re Contempt of Robertson*, 209 Mich App 433, 439; 531 NW2d 763 (1995); *Detroit Bd of Ed v Detroit Federation of Teachers*, 55 Mich App 499, 505-06; 223 NW2d 23 (1974). Thus, the court found in *In re Contempt of Robinson* that, where the order of contempt was based on the representations of *plaintiff's counsel* made at a motion hearing and not through an evidentiary hearing, **there was not sufficient evidence to support an order of contempt because the finder of fact had not gained personal knowledge of the contempt** (emphasis added). *In re Contempt of Robertson*, 209 Mich App at 440-41.

The case at bar is on all fours with *In re Contempt of Robertson*. The *only* evidence plaintiff has brought before this Court thus far is counsel's own statement made on information and belief[1]. Such representation of counsel is insufficient evidence of defendants' alleged contempt. As a result, plaintiff's motion should be denied.

Moreover, plaintiff seeks to take away defendants' liberty, perhaps the single-greatest punishment, in the absence of any evidence of continued wrong-doing, without presenting proof of one with personal knowledge, without due process, and without cause. It is well-established that any jail confinement should be a last resort, and considered judiciously. *In re Contempt of Auto Club Ins Ass'n*, 243 Mich App 697; 624 NW2d 443.

Continued contempt and incarceration is conditional upon the contemnor's continuing in his contempt. The party thus has the opportunity to secure his release by purging himself of his contempt. Plaintiff's motion lacks any evidence that defendants are continuing in their contempt. To the contrary, as evidenced by the attached photographs (Exhibits A and B), defendants have purged themselves of the contempt with which they were charged. All compostable material have been removed from the property.

Furthermore, the statute requires that the court find that the defendant is or could be of "sufficient ability" to comply with the contempt order. *Sword v Sword*, 59 Mich App 730, 734; 229 NW2d 907 (1975). Such ability to comply is also prerequisite to a sentence of coercive

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1 "3. On information and belief, Defendants have done nothing to comply with this court's order requiring Defendants to remove all compostable materials from their property in Macomb Township."

commitment. *Borden v Borden*, 67 Mich App 45, 50; 239 NW2d 757 (1976). When the purpose of the court is to coerce compliance, "it must then consider the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired." *United States v United Mine Workers*, 330 US 258, 303-304 (1947); *In re Contempt of Dougherty*, 429 Mich 81, 98; 413 NW2d 392 (1987).

Plaintiff fails to even address the character and magnitude of the harm threatened by the alleged continued contumacy. This would, indeed, place a difficult, if not impossible, burden on plaintiff, because the finished compost plaintiff alleges is on site would have no offensive odors, and does not pollute the air, waters, or land, and is not harmful in any way. Accordingly, in keeping with *United States v United Mine Workers,* plaintiff's motion to have defendants incarcerated should be denied in its entirety, along with plaintiff's request for reimbursement for costs.

IV. AS A MATTER OF PUBLIC POLICY, PLAINTIFF'S MOTION SEEKING DEFENDANTS' INCARCERATION AND REIMBURSEMENT FOR COSTS SHOULD BE DENIED

Plaintiff has motioned this Court to have defendants incarcerated for alleged continuing contempt of the February 27, 2008 Opinion and Order. However, in support of its motion for incarceration, plaintiff presents no proof of the assertion made. Plaintiff's motion is based solely on one statement made by counsel "on information and belief." Counsel attached no affidavit, no photographs attesting to a continuing willful violation of this court's order, and no

evidence of an individual with first-hand knowledge of the facts and circumstances of this assertion. As a matter of public policy, defendants submit that should be insufficient evidence to warrant taking away an individual's liberty.

When considering contempt proceedings, a trial court must seriously consider the alleged wrong, and weigh it against society's best interests. In the case at bar, defendants were initially held in contempt for keeping finished compost on their 300 acre farm.[2] Plaintiff now, without further proof of continuing contempt, wants defendants Ronald and Delores Michaels incarcerated. Yet, plaintiff fails to state the conduct which warrants incarceration. Plaintiff further omits any admissible proof of the alleged continuing contempt.

This is nothing more than a vexatious pleading filed by plaintiff against defendants. It should be identified as such. Plaintiff's request for an order incarcerating Ronald and Delores Michaels should be denied in its entirety, and Plaintiff's request for Defendants to reimburse the Township fees and costs within seven (7) days from the motion hearing date should be denied.

WHEREFORE, Defendants, Ronald Michaels and Dolores Michaels, respectfully request that this Honorable Court deny plaintiff's request for an order (a) incarcerating Ronald and Delores Michaels, and (b) requiring defendants to reimburse the Township fees and costs within seven (7) days from the motion hearing date, together with such other

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[2] It is undisputed that defendants stopped taking leaves, grass, yard clippings, and other compostable material onto their farm since December 31, 2005. There have been no odor complaints made respecting the Rondigo farm since 2005.

and further relief as to this Court may seem just and proper under the circumstances.

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Dated: April 9, 2008